SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, A. D. 1901.

No. 408.

P. H. KIRWAN, AS UNITED STATES SURVEYOR-GENERAL FOR THE DISTRICT OF MINNESOTA, AND
THOMAS H. CROSWELL,

Appellants.

vs.

SIMON J. MURPHY, GEORGE O. ROBINSON, ELISHA H. FLINN AND TEMPLE E. DORR,

Appellees.

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF ON BEHALF OF APPELLEES.

Statement of Case.

This is a bill in equity wherein the complainants ask for a decree restraining and perpetually enjoining the defendants from making a survey of

certain lands surrounding Cedar Island Lake, now known as Ely Lake, in Township Fifty-seven (57), North of Range Seventeen (17) West, St. Louis County, Minnesota, such survey having been ordered by the Land Department of the United States.

At the time the suit was commenced, the defendant Kirwan was United States Surveyor-General for Minnesota, and the defendant Croswell was a Deputy Surveyor, with whom a contract had been made by order of the Commissioner of the General Land Office to make the survey.

Upon the filing of the bill, and after due notice and hearing, the temporary injunction was issued as prayed for in the bill. The order allowing the temporary injunction was appealed from, to the United States Circuit Court of Appeals, Eight Circuit, and the order affirmed.

Murphy et al vs. Kirwan, 103 Fed. 104.

The defendant then appealed to the Supreme Court of the United States, and on motion of the appellees the appeal was dismissed.

Murphy et al vs. Kirwan, 70 U. S. 205.

The proofs were thereafter taken, and on the first day of December, 1899, the case was brought on for hearing, on pleadings and proof and argument of counsel before the Hon. William Lochren, Dis-

trict Judge, sitting as Circuit Judge. The case was duly submitted and by the Court taken under advisement. The Court's opinion and decision therein was filed the 16th day of July, 1900, with an order that the decree as prayed for in the bill be entered, (Pp. 330-336, Printed Record). On the 23rd day of July, 1900, after due notice, a decree for the complainants was entered, decreeing that the complainants were the grantees and owners by mesne conveyances from the patentees of the title of record and in fact to the land in controversy; and that the said fractional lots extend to and are bound by the actual waters of Cedar Island Lake; that the defendants had no jurisdiction or authority to meddle with said land or to make the survey complained of in the bill.

It was further ordered and decreed that the temporary injunction issued in the suit be and the same was declared perpetual, Printed Record, page 340-342, page 338-339. The defendants appealed from such decree to the United States Circuit Court of Appeals, Eight Circuit, and the decree was affirmed, (page 347-348, Printed Record). It is from this decision that the defendants appealed to this Court.

The following are the undisputed facts in the case.

On or about April 26, 1876, a contract for the survey of all lands in Township 57 North of Range 17 West, in St. Louis County, Minnesota, was made

by the Government of the United States with one Henry S. Howe, as a Deputy Surveyor of the United States, and thereafter said Howe made and filed field notes of a survey of said Township, from which the official plat of said Township was thereafter made and approved by the Surveyor-General of the United States for the District of Minnesota, and by the Commissioner of the General Land Office; of which plat Exhibit "A," attached to the bill of complaint, is a substantially correct copy.

There is no evidence upon the ground that any actual survey of said Township 57 was ever made by said Howe as required by his said contract and by the rules and regulations of the General Land Office, or at all, beyond the running and due marking of the exterior boundary lines of said Township where the section, quarter and other posts and markings established by him are, and always have been, clear, distinct and readily found and traced. There is no evidence on the ground that section lines were ever run by him in or across said Township, or section corner posts or quarter posts ever located or set by him, except a corner post at the Northwest corner of Sec. 36, and a quarter post in the Western line of said Sec. 36, and there is no evidence that witness trees were ever blazed or marked by him.

Cedar Island Lake is a navigable, deep and permanent body of water, fed principally from springs, having an area of about nine hundred acres, instead of about eighteen hundred acres as described in the field notes of Howe and shown

on said official plat of said Township. Instead of the shores of said lake being low and swampy, as stated in said field notes, the banks are generally high and sloping lands suitable for agriculture, extending around the lake, and support a growth of pine and other forest trees large enough for lumbering, such as will not grow in water. The condition was the same in 1876, and no material part of the land surrounding the lake is accretion. Southerly and westerly of said Cedar Island Lake are five other deep, navigable lakes in the same Township, none of which are shown by the field notes of Howe's survey or upon said Government official plat of said Township: and all of the land in said Township, as shown by said official plat, since the making of said plat, has been sold and patented by the Government, as land, according to said plat. There is no other evidence that the meander line of said Cedar Island Lake was ever surveyed by said Howe, except the field notes, plat and patents, or any meander posts placed by him about said lake, except one where the North line of said Township encounters said lake; and the outlet of said lake is at a different place from that described in said field notes and shown upon said official plat. After the making of the said survey and plat, and before its approval, complaints touching the accuracy thereof were made to the Commissioner of the General Land Office, but, on the withdrawal of such complaints, the said survey and plat were approved.

The land lying between the actual water line of Cedar Island Lake and the meander line of the lake,

as delineated on said official plat of said township, comprise the land in controversy in this suit, and is the same land directed to be surveyed by the Commissioner of the General Land Office, and referred to in the Surveyor's contract which is attached as Exhibit "A" to the answer in this suit, being therein described as

> "The public lands situate in Sections 2, 3, 4, 9, 10 and 11, in Township No. 57 N. R. 17 W. of the 4th principal meridian lying between the 'Old Meander' of Cedar Island Lake, as given by the original field notes of Henry S. Howe, United States Deputy Surveyor, approved by the Surveyor-General of Minnesota, August 19, 1876, and the shore line of said Cedar Island Lake."

Prior to the commencement of this suit the United States had sold and by its patents had conveyed to the purchasers according to said official plat, made from said Howe survey, all the land in Township 57, as the same appeared upon said plat, to which plat all of said patents expressly referred, it being then and still the only Government plat of said township.

The complainants are the grantees and owners by mesne conveyances from the patentees of the record title to the following described fractional lots in said township, to-wit: Lots one (1), two (2) and three (3) in Section two (2); Lots one (1) and two (2) in Section three (3); Lots one (1), eight (8) and portions of Lots three (3), five (5), six (6) and seven (7) in section four (4); lots one (1), two (2), three (3) and four (4) in section nine (9); lots

one (1), two (2), three (3) and four (4) in Section ten (10); and Lot three (3) in Section eleven (11), being the same lands which are more particularly described in complainants' bill, and each of which fractional lots appear and are represented on said official plats as bounded by and upon Cedar Island Lake. There is no allegation or proof that complainants, or any of the grantors in their chain of title, including the patentees, had any notice or knowledge of any fraud or misconduct on the part of said Howe in or about the making of said survey and field notes, or that there was any inaccuracy in said survey, and, so far as it appears, all were purchasers in good faith of said lands.

Complainants purchased said fractional lots in 1883 from the patentees or their grantees in their chain of title, for the pine timber thereon, and the convenience of landing the timber so purchased, and a large amount of other timber which they owned, lying in the township adjoining, it being the intention of complainants to use Cedar Island Lake and the riparian rights which it afforded to facilitate ther lumberig operations, and to transport their timber to market from this lake and through the waters of the St. Louis River to the place of manufacture. The complainants then were and ever since have been and now are non-residents of the state of Minnesota, being residents of the State of Michigan; but before making such purchase, and just prior thereto, they caused the lands to be explored and examined by an experienced timber estimator, who in making such examination used as his guide, as is customary in such cases, a copy of

said official plat of said township which did not have upon it any statement of the acreage or amount of land in any of the subdivisions, and who reported to the complainants his estimate of the amount of pine on said lands and the general character of said land, and the riparian character thereof as bounded upon Cedar Island Lake, and the facilities which it furnished for holding and marketing their timber, but did not discover or report any error in the survey of said township, or any error or mistake in the said official plat. And the said complainants purchased, paid for and took conveyances of said lands in good faith, and without any notice or knowledge of such fraud, error or mistake, paying for the land and these fractional lots on an actual estimate of the timber to the actual shore line of Cedar Island or Ely Lake.

The other permanent lakes in said township, not shown upon said official plat, but appearing thereon as land, and since sold and patented by the Government as land, according to such official plat, include areas equal to the area of said Cedar Island Lake; and portions of such lakes were purchased by complainants as land, with their other purchases in said Township, and the adjoining Township on the North.

The survey sought to be restrained in this suit was ordered by the Commissioner of the General Land Office, upon the direction of the Secretary of the Interior, in proceeding instituted by certain settlers upon the land in controversy, of which proceedings the complainants had due notice, and in which they appeared, and covers but a small por-

tion of the township, only the fractional lots about Ely Lake and bordering thereon, embracing only about 900 acres, Fol. 302, page 101. In the remainder of the township like and greater errors occur. A glance at the plats, complainants' Exhibit "A" and "D," demonstrates this. See also Folio 303, Record. In that part of the township lying south of the territory sought to be surveyed, there is an absence of interior lines, and no evidence on the ground that any section corner posts or quarter posts were ever set by the Government Surveyor, Fol. 301-303, Record. This territory, however, which the Government has taken no steps to survey, the patentees and their grantors, including the complaints in this suit, are the sufferers by the deficiency, as an examination of the plat, Exhibit "D," shows: The lakes which the Government has sold as land and do not appear on the Government plat exceed the entire area of Cedar Island Lake, or Ely Lake, as shown on the Government plat, Fol. 310 Printed Record.

In 1894, and prior to the institution of the proceedings which culminated in the order for the survey, to enjoin which this suit was commenced, the County Surveyor of St. Louis County, pursuant to the order of the Board of County Commissioners, made a survey of the two northern tiers of sections in township 57-17 for the purpose of re-establishing the interior lines and corners, Printed Record, Fol. 763, page 255; Fol. 718, page 240; Fol. 509, page 170; Fol. 432, page 144. The correctness of this survey is confirmed by three competent engineers and land surveyors, and is not disputed by the

defendants, in pleading or proof, Printed Record, Fol. 525, page 175; Fol. 498-499, page 166-167. Complainants' Exhibit "D" attached to the bill is based in this survey. And does not threaten the rights of the complainants or any other property owner in the township.

There are ten forties known to be underlain with iron ore, with a tonnage of twenty millions, on which mining has been in progress for seven years (two since testimony was taken) and the boundaries of valuable timber land, on much of which timber has been cut, would be affected by a re-survey, as ordered by the land department, the boundaries of the mining property and of the timber land having been fixed by the Patton Survey, Printed Record, Fol. 507, 508, page 170; Fol. 527, 528, page 176. The lines and corners in the portion of the township not covered by the order can be readily established on the principles of the Patton Survey.

The greater portion of the land in dispute is covered with valuable pine timber. A new survey, to be of use to any one, must be by the best methods: this is obvious. A survey by solar compass would not be sufficiently accurate. A clear transit line must be cut through the heavy timber, and measurements taken with steel tape and plumb bob through about one hundred miles of lines, Folio 234, Printed Record. Not only will the valuable timber which must be cut for the transit lines be destroyed, but from the debris resulting, the remainder of the timber will be endangered by fire, and complainants will thereby be greatly and irreparably injured.

An examination of the instructions to the defendant, the Deputy Surveyor, commencing on Fol. 165 of Printed Record, a part of defendants' answer, shows that the survey by the methods proposed must necessarily provoke a multiplicity of suits, not only between the complainants and settlers on the land in dispute, but between adjoining owners of the vast deposits of iron ore and millions of feet of pine timber, still in and on the land and the portion which has been already removed therefrom.

The defendants on previous hearings of this case have assumed that it is a conceded fact that the interior of this township has never been surveyed. This we have always, and do now, most strenuously deny, and the conceded facts in the case, we believe, support our position.

ARGUMENT

The proposed action of the defendants in making this survey is justified on the sole ground that they are the subordinate officers and agents of the interior Department of the United States, and are acting under and by virtue of the authority and orders of their superior officers. It is, therefore, a question of the authority of the Land Departmnet of the United States to order the survey, and the questions involved in the case all turn upon the point, whether the land sought to be surveyed is Government land.

The complainants contend that it is not Gov-

ernment land; that the sale of these fractional lots by patents describing the land as "according to the official plat of the survey of said land returned to the General Land Office," conveyed all the lands in the fractional lots, such lots so conveyed extending beyond the meandered line to the actual waters of Cedar Island Lake, the lake itself constituting the boundary as shown by the Government plat, although the lake is not correctly delineated thereon.

If we are right in this proposition, it follows as a matter of course *that the Department of the Interior has no jurisdiction over these fractional lots, or over the land lying between the meander line and the actual waters of the lake on these lots, and has no right to order or cause a survey of the same, and may be enjoined.*

From the facts in this case which are clearly established and undisputed, nearly all of which are admitted in the answer or by the stipulation of facts, the decree of the Circuit Court, and the order affirming it by the Court of Appeals, should be affirmed. No stronger case for the equitable interference by the Court has been cited on either side in the various arguments which have been presented in the history of this proceeding than appear in the case at bar.

The complainants are the owners of the fractional lots, which lots are described "as according to the official plat of the survey of the said lands returned to the General Land Office by the Surveyor General." The official plat shows these lots to be bounded by and upon the waters of Cedar island Lake, now known as Ely Lake. If there was

any fraud in the original survey, or any inaccuracy in the survey and plat, neither the patentees nor the complainants, nor any one of the complainants' grantees in their chain of title had any notice or knowledge. *They purchased the land in good faith relying on the Government plat, and one of the principle inducements to the purchase was the riparian rights which the lake as a boundary furnished in lumbering and marketing, not only the timber on the land whose boundaries are in dispute in this action, but also a large amount of other timber which they then owned and for which there was then no other feasable route to market.*

They also purchased every foot of land in these fractional lots with boundaries extending to the actual waters of the lake. They purchased it on an actual estimate of the timber extending to the actual waters of the lake.

Cedar Island Lake, or Ely Lake as it is called, exists on the ground and there is no other body of water which will meet the calls of the patent or that the meander line can represent. This lake is the natural, unchangeable monument and boundary to these lots; it is the only fixed and visible boundary to the lots on the lake side, no other water intervenes at any point between the meander line and the actual waters of the lake.

The Land Department of the United States now proposes to take summary possession of the most valuable part of these lots, the portion which furnished the principal inducements for purchase by the complainants, and the only portion by which the patentees or their grantees were able to

locate with certainty the boundaries of these lots from a fixed and visible monument.

I.

Government bound the same as an Individual by its Contracts.

In the surveying, platting, offering for sale and selling of lots the Government deals as proprietor. The transactions are matters of business, and, as between the Government and its patentees, or the purchaser from such patentees, all of the rules applicable to private ownership and private sales attach as in the case of an individual vendor.

U. S. vs. San Jacinto Tin Co., 125 U. S., 273 (31 L. 751).
Clarke vs. U. S., 6 Wall. (U. S. 543).
U. S. vs. Smoot, 15 Wall. (U. S.), 47 (21 L. 107).
Amoskeag Mfg. Co. vs. U. S., 17 Wall. (U. S.), 592 (21 L. 715).
U. S. vs. Bostwick, 94 U. S., 53, 66 (24 L. 66).
U. S. vs. Smith, 94 U. S., 4 Otto., 214 (24 L. 115).
Chicago, etc., R. Co. vs U. S., 104 U. S., 680 (26 L. 891).

This court has always held whenever the question has come before it, that the United States are as much bound by their contracts as are individu-

ais, and without compensation cannot take back that which they have granted, nor defeat a vested right arising from any source.

Union Pacific R. R. Co. vs. U. S. 99 U. S. 700-718 (25 L. 501).

U. S. vs. Stanford, 161 U. S. 433 (40 L. 760).

Hepburn vs. Giswold, 75 U. S. 603-624 (19 L. 513-526).

II.

Government is bound by its Plat.

The Government as against purchasers in good faith is bound by its plat in accordance with which it has sold and conveyed all the land in that township. *The Government lots in question were patented and described in such patents as according to the official plat of the survey of the said land returned to the General Land Office by the Surveyor General. Fol.* 785, 789, 821, 825, 861, 870, 769, 888, 893, Printed Record. Where any grant or conveyance is made according to the plat, that plat becomes, for the purpose of description and identification of the land, a part of the deed or other instrument of conveyance.

Schurmeier vs. Railroad Co., et al., 10 Minn., 82 (Gil.) 59.

St. Paul, Stillwater & Taylor Falls R. R. Co. vs. First Div. of St. Paul & Pac. R. Co., 26 Minn., 31.

Nicolin vs. Schneiderhan, 37 Minn., 63.

Erkens vs. Nicolin, 39 Minn. 461.

Everson vs. City of Waseca, 44 Minn., 247.

Lampry vs. State, 52 Minn., 192.

Lampry vs. Mead, 54 Minn., 298.

Olson vs. Thorndyke, 76 Minn., 366.

Castle vs. Elder, 57 Minn., 289.

Grand Rapids and I. R. Co. vs. Butler, 159 U. S., 87 (40 L. 85).

Railroad vs. Schurmeir, 7 Wall., 272. confirming Schurmeir vs. R. R. Co., Supra. (19 L. 74).

McIver's Lessee vs. Walker, 9 Cranch. 173 at 177 (3 L. 694-696).

Moore vs. Robbins, 96 U. S., 580 (24 L. 848).

County of St. Clair vs. Lovingston, 23 Wall., 46 (23 L. 59)

U. S. vs. Schurz, 102 U. S., 379 (26 L. 167).

Jeffreys vs. Omaha Land Co., 134 U. S., 178 (33 L. 872, 878).

Hardin vs. Jordan, 140 U. S., 371 (35 L. 428, 433).

Jones vs. Soulard, 65 U. S., 24 How., 41 (16 L. 604, 602).

Mitchell vs. Smale, 140 U. S., 406 (35 L. 442).

Noonan vs. Braley, 2 Black, 499-509 (17 L. 278-280).

Horn vs. Smith, 159 U. S., 40 (40 L. 68).

Jones vs. Johnson, 59 U. S., 150 (15 L. 320).

Niles vs. Cedar Point Club, 175 U. S., 300 (44 L. 173).

French Glenn Live Stock Co. vs. Springer, 22 S. Ct. Rep., 566.

Meander Line not a Boundary.

The cases in the foregoing subdivision all hold that meander lines run in surveying fractional portions of the public lands, bordering upon navigable bodies of water, are not boundaries of the tract, but are for the purpose of defining the sinuousities of the bank of a stream, and as the means of determining the quantity of upland to be charged for; and such meander line does not limit the title of the grantee thereto. But where land is granted abutting on waters whose margins are thus meandered the waters themselves constitute the real boundaries, although they may not be coincident to the meander.

III.

Complainants are bona fide Purchasers in Good Faith.

Neither the patentees nor the complainants in this action nor any of the intermediate grantors are charged in the answer with any notice or knowl-

edge of fraud or misconduct on the part of the Surveyor Howe in the making of the survey or the field notes or any connection therewith, and there is no evidence that any of the patentees or intermediate grantors in complainants' chain of title had any notice or knowledge of any fraud or irregularity in the making of the survey or of the field notes.

It is an undisputed fact that this land was purchased from the Government by the respective patentees several years after the plat was approved and filed. (See date of patents, pages 23 to 31 of the Record) and the complainants purchased it after it had passed through several hands.

The complainants as to the Federal Government are remote grantees. See complainants' chain of title, Fol. 548 to 562, inc. of Record, and the several conveyances, Fol. 768 to 932 inc. of Record.

It is an undisputed fact in the case *that the complainants purchased the land in good faith, with no knowledge of any irregularities or fraud in the survey. That they purchased it relying on the Government plat and descriptions that the lots were bounded by the lake. That they purchased the land for the pine timber and also for the lake frontage*, as they had a large amount of timber just north of the lake, and at that time the lake was considered the only outlet for the timber. *The land was bought and paid for on an estimate of the timber up to the actual lake shore, was purchased for the riparian rights which the land possessed bordering on the lake, for the purpose of flooding said lake as a reservoir and holding ground in case of fire, and banking ground for the lumbering of timber, this was the object and basis of the purchase.*

The complainants by their bill allege that they are the *owners in fee of the land in dispute,* (Fol. 1 to 6 Printed Record) and the chain of title from the Government of the United States to themselves is particularly set out in the bill, (Fol. 15 to 23 Printed Record); *that they paid a valuable consideration for the same;* that they *purchased the same on an actual estimate of the pine timber at the time of the purchase standing on the land and extending to the actual waters of the lake;* that they purchased the same *in good faith, believing that their respective grantors had good and perfect title to the same* and to the whole thereof *extending to the actual waters and shore of the lake, and in reliance upon said Government plat; that they had no knowledge of the inaccuracy of the official survey of the township, or that there was any fraud in the survey, or that any fraud or inaccuracy was claimed in relation thereto at the time they made the purchase* or at any other time, until they learned of the application for the survey as set forth in the bill (Fol. 24 Printed Record); that at the time they made the purchase and at the time of the filing of their bill, they were the owners of a large amount of other pine timber standing on the land right north of the lake in question. The estimated amount of the timber at the time of the purchase being about sixty million feet, and the principal consideration that moved complainants to purchase the said Government lots was that the pine timber then owned by them in the adjoining township could be lumbered and placed in said lake and through its outlet floated down the St. Louis River

to market. That at the time of the purchase there was no other feasable means of transporting said timber to market, Fol. 25 Printed Record. The defendants by their answer admitted that the commissioner of the General Land Office approved said survey and plat after complaints were brought to his notice touching the accuracy thereof, (Fol. 110.) The defendants deny any knowledge or information as to the patenting of the Government lots shown upon the plat of the said Howe survey, or of the mesne conveyances from the patentees thereof to the complainants, and put complainants to the proof thereof. And defendants deny that they had any knowledge or information sufficient to form a belief as to what consideration, if any, was paid by the complainants or any of them for any conveyance to the complainants or any of them of any part of the land described in the complaint, or as to whether the complainants purchased any of the said lots in good faith or otherwise, or for the reasons stated in said bill or otherwise, Fol. 114, Printed Record. In the stipulation of fact and evidence, however, it is admitted *that the complainants are the grantees and holders by mesne conveyances from the patentees of said fractional lots*, (Fol. 309, Printed Record.) The following is the testimony bearing on the question of the purchase of the land by the complainants in good faith with no knowledge or notice of any fraud in the original survey or any inaccuracy therein, relying on the Government plat, and with the intention on the part of the complainants to acquire the riparian rights by reason of the fractional lots being bound-

ed by the actual waters of the lake. We quote such testimony entire commencing with the deposition of Elisha H. Flinn, Fol. 312 of Record to Fol. 324 of Record, inclusive:

DEPOSITION OF ELISHA H. FLINN.

Q. Where do you reside?

A. Detroit, Michigan.

Q. How long have you lived there?

A. Thirty years.

Q. State if you were one of the owners of the land which is in controversy?

Objected to as calling for a conclusion, and as incompetent.

A. Yes, sir.

Q. What knowledge have you of land about Ely Lake in Township 57-17 in this county, Mr. Flinn?

A. I have no personal knowledge, never was in the township until day before yesterday, in Section 5.

Q. State what you had to do, if anything, with negotiations of purchasing this land for Simon J. Murphy of Detroit?

A. I attended to the details of the purchase.

Q. State what was the basis of such purchase?

A. We purchased this land for the pine timber and also for the lake frontage, we having a large amount of timber just north in Township 58-17, and at that time considered that as the only outlet for the timber. The purchase of the land in 57-17 was largely for the outlet, as we supposed, of the lake; also the timber and land in the western part of the lake in 9 was purchased to control that portion in case we should dam the lake as a reservoir. We had no

knowledge whatever of any fraud or anything of that kind in connection with this survey.

Q. How about what you supposed to be the outlet of the lake?

A. Supposed it was on Section 11.

Q. You secured that to control the outlet?

A. Largely for that purpose; there was some timber on it too.

Q. Wouldn't you have bought it except for that?

A. No.

Q. How about that in section 9 covered by the waters of St. Maries' Lake?

A. This is the first I knew of it when I saw the plat here, that our land on section 9 was mostly under the waters of St. Marie's Lake.

Q. Supposed all the time it was timber land?

A. Yes.

DEPOSITION OF COMPLAINANT SIMON J. MURPHY.

1st Interrogatory. What is your name, age and occupation, and where do you reside?

1. A. Simon J. Murphy; age, eighty years; has always been that of a lumber man. Residence, at Detroit, Michigan.

2nd Interrogatory. State what interest you have, if any, in any portion of the following described lands situated in St. Louis County, State of Minnesota, viz: Sections 2, 3, 4, 9, 10 and 11, Township 57 N. R. 17 W., Fourth Principal Meridian of Minnesota, and state the particular description thereof in which you have or claim interest, if any?

A. I own an undivided one-half interest in Lots 1, 2, 3 of Section 2; Lots 1, 2 of Section 3; Lots 1, 8 of Section 4; Lots 1, 2, 3, 4 in Section 9; Lots 1, 2, 3, 4 of Section 10; Lot 3 of Section 11, Town 57 north, range 17 west; Lot 2 of Section 35; and Lots 1, 2 of Section 34, town 58 north, range 17 west, St. Louis County in the State of Minnesota.

3rd Interrogatory. If you state you have, or claim to have, an interest in such land, state when, and of whom, you purchased the same, and the land and interest originally purchased by you, and where you resided at the time you made such purchase.

A. On or about the 11th of April, 1883, I purchased the entire title from Phillip M. and Edmond D. Graff and Daniel E. Little to lots 2, 3, 4 of Section 1; lots 1, 2 of Section 3; lots 1, 8 of Section 4; lot 4 of Section 9; lots 1, 2, of Section 10; in town 57 north, range 17 west, together with lot 1 of Section 34, and lot 2 of Section 35, town 58 north, range 17 west. This purchase from Graff and Little included about 4000 acres tributary to Ely Lake in towns 57 and 58 north, range 17 west.

Fol. 317. 4th Interrogatory. If you say in answer to preceding interrogatories that you purchased any portion of said land, state what you supposed to be the true boundaries of any piece of said land so purchased by you, at the time you made such purchase.

A. On or about February 16th, 1884, I purchased of Morris Thomas of Duluth, Minnesota, lots 1, 2, 3 of Section 2, besides 80 acres of section 9 in same town. On or about ———— 1884, I purchased of the Nelson Lumber Company of Cloquet, Minnesota, NW¼ of SW¼ of Section 11, town 57 north, range 17 west, and lot 2 of section 34, town 58 north, range 17 west, besides about six hundred acres in Sections 13, 14 and 34.

town 58 north, range 17 west. On the 5th day of April, 1883, I purchased of Scott Griswold of Kent County, Michigan, lots 1, 2, 3 of Section 9, and one hundred and sixty acres in sections 8 and 9, town 57 north, range 17 west in same county. I also purchased about that time and since then other considerable tracts of pine timber in other parts of St. Louis County, Minnesota, for the purpose of lumbering.

A. (Fol. 321). I purchased these lands for their pine timber and originally took the title in my own name, intending to lumber the timber in the two towns above described into Ely Lake in the usual manner of lumbering by water. At that time there was no railroad contemplated in that locality, and I bought the lands around Ely Lake to facilitate the lumbering operations of this surrounding tract of pine timber, in the usual course of business, without any knowledge of any special excess in any of the descriptions.

Fol. 317. 5th Interrogatory. At the time you made such purchase what evidence of the boundaries of each of such descriptions so purchased by you, did you examine?

5. A. (Fol. 321). When I purchased these lands around Ely Lake I relied upon the plats and Government descriptions that they were bounded by the lake. I bought and paid for the timber which was estimated up to the lake shore at the rate of $1.65 per thousand feet at the time, which estimate included all the timber up to the shore of the lake.

Fol. 317. 6th Interrogatory. What did you rely upon as the evidence of the true boundaries of such lake at the time you made such purchase?

6 A. (Fol. 322). I took the report

and examination of my woodsman, relying upon the Government plat that the lands were bounded by the lake. I made no examination of the lands personally.

Fol. 318. 7th Interrogatory. What was the base of the purchase price of each piece of said land so purchased and paid for by you?

7 A. (Fol. 322). Upon the Government descriptions and boundaries, and upon the plats which I examined.

Fol. 323. A. The object and basis of said purchase of the lands bordering on Ely Lake was their value for the timber which stood upon them and the riparian rights which lands bordering upon Ely Lake possessed for the purpose of flooding said lake for a reservoir and holding ground in case of fire, and banking ground for the lumbering of timber. At that time no railroads had ever been contemplated in that locality, and I expected that this timber would be brought out through the streams and I relied upon this lake with which to lumber all this timber in that vicinity, comprising in all about 5600 acres and containing an estimate of upwards of 60 million feet of pine timber.

Fol. 318. 8th Interrogatory. When did you first hear of an alleged fraud in connection with the original Government survey of this land?

(Answered Fol. 324, 9th answer; mistake of printer.)

A. (Fol. 324.) Do not know that I have ever heard that there was any fraud. I have heard indirectly, long after I had made the purchase, that the survey of the lake was not very complete, but to what extent have never known. I have such rumors about them years ago.

Fol. 318. 9th Interrogatory. Before

or at the time you closed the purchase of said land had you heard of any fraud or rumors of fraud connected with the original Government survey of said land.

(Answered in Fol. 324, answers 10 and 11, error of printer.)

A. 10 and 11. (Fol. 324.) No. Nothing.

The following is from the testimony of complainant Geo. O. Robinson, who owns a one-sixth interest in the lands in controversy; commencing at Folio 332 of Printed Record:

Q. What is your name, age, occupation, and where do you reside?

A. My name is George O. Robinson, my age is 66 years, I reside in the city of Detroit, Michigan; my occupation is that of a retired lawyer and pine land dealer, associated with Mr. Elisha H. Flinn under the firm name of Robinson & Flinn.

Q. How long have you resided in Detroit continuously?

A. Upwards of 37 years.

Q. Where did you reside when you made said purchase? and of whom did you purchase the same and when?

A. I resided in Detroit, and purchased these lands as above stated and at the time stated in my answer to the preceding question.

Q. At the time you purchased this land what evidence did you have of the boundary of the several descriptions?

A. No other evidence than the Government plats and the lines and corners as found and the survey made by our woodsmen.

Q. What examination did you make of such evidence of boundaries and for what purpose did you make such examination?

A. We made no other examination

than that made by our woodsmen in identifying the land from the Government plats sufficiently for the purpose of estimating the timber and locating the riparian rights on the lake.

Q. What evidence did you rely on in making said purchase?

A. We relied upon the Government plats showing lots bounding on the lake and that they contained the amount of timber estimated by our woodsmen.

Q. What was the basis of the purchase price of each parcel of land so purchased?

A. The basis of each purchase, as far as I recollect, was the price per thousand, feet for the actual amount of timber estimated upon the entire tract as identified by our woodsman. The fractions around Cedar Island Lake were considered as of special value, aside from the timber, for their riparian advantages for lumbering purposes.

Q. When did you first hear of alleged fraud in connection with the original survey of the land?

A. I never heard of any alleged or other fraud until after this controversy had been commenced, and since then I have never heard of it in any other connection.

Q. When did you first hear of the inaccuracies in the original Government survey of the land?

A. Some time about the years 1892 and 1893; about the time the squatters referred to in this suit commenced to take possession of the lands about the lake?

Q. What, if anything, had you heard of inaccuracies in the Government survey of this land, or of fraud in connection therewith, before or at the time you closed such purchase?

A. I had not heard of either at that time.

Q. State what rumors of fraud, if any, you had heard in connection with the original government survey of this land before or at the time you closed the purchase of the same?

A. I had not heard of any.

Q. State what rumors of inaccuracy in said Government survey, if any, you had heard before or at the time you closed said purchase?

A. I have no recollection of having heard at that time of any inaccuracies relating to the survey of this land, until nearly 10 years after the purchase of this land.

Q. State what circumstances, if any, had come to your knowledge before or at the time you purchased this land in connection with said Government survey?

A. Not any such circumstances came to my knowledge.

Q. In examining the evidence of the boundaries of the several parcels of land so purchased by you and the estimate of the timber on the several tracts, state what circumstances, if any, appeared which would suggest fraud or inaccuracy in the Government survey? I refer to examinations made with a view of making said purchase.

A. There were no circumstances in any way suggesting fraud or inaccuracy in the Government survey in this purchase, nor were there circumstances in connection with the purchase of this land at that time different from scores of other purchases of other lands in a similar manner.

Q. State what was the feature of this land and timber as presented to you which you relied on in making the purchase and which principally induced you to make the purchase?

A. The features presented to us in making these purchases were: 1st. The

amount of timber, of which we secured in this purchase some 43,000,000 feet lying tributary to Cedar Island Lake. 2nd. The value of the boundaries on that lake to us in lumbering the timber, as at that time it appeared that this was the only outlet for this whole tract of timber, and the fact that we received this tract from Mr. Thomas Presnell, a former United States Land Register, gave as confidence in the regularity of the tract. About the same time we purchased other timber in T. 57 N. of R. 17 W and T. 58 N. R. 16 and 17 W. and also timber elsewhere in St. Louis County, Minnesota, aggregating by our estimate 125,000,000 feet of pine timber, and this tract was purchased in connection with the other tracts for the purpose of facilitating lumbering.

The following is from the testimony of Erwin Eveleth who examined the lands for the complainants at the time the purchase was made; commencing with Fol. 351.

Q. Mr. Eveleth, state your name, address, age and occupation?

A. Erwin Eveleth; Corunna, Michigan: age 57; occupation land-looker and estimator.

Q. How long have you been engaged in the business of examining and estimating lands?

A. Since 1866.

Q. Did you examine the lands purchased by Simon J. Murphy around and in the vicinity of Cedar Island Lake in T. 57 and 58 N. R. 17 W., St. Louis County, Minn., and when?

A. I did, in the spring and fall of 1883.

Q. How much land did you examine

and estimate that was purchased by him at that time?

A. There was like about 10,000 acres that was purchased that season.

Q. About how much that was purchased tributary and adjoining Cedar Island Lake, should you think?

A. About 4,000 acres.

Q. In locating the various lots, fractions and other descriptions upon what did you rely?

A. Upon the survey as we found it around the lake.

Q. Did you have a Government plat?

A. I did, yes, sir; I went by that.

Q. Did you have any knowledge that there was any fraud or irregularity in the survey of the lands around Cedar Island Lake at the time you took the Government plats and went to examine them?

A. I did not.

Q. Did you know at the time you looked the land that the fraction on the Cedar Island Lake were larger than they appeared to be on the Government plat?

A. Yes, I did. They were larger on the north side than they appeared to be on the Government plat.

Q. Did such excess occasion you any surprise or suspicion of any fraud in the survey?

A. No, sir, it did not.

Q. Is it or is it not usual and common that fractions adjoining lakes and meanders of rivers are often greater or smaller than appears by the Government plat?

A. It is.

Q. Did you note any other apparent excess or shortage in the lands purchased by Mr. Murphy at that time?

A. I did in T. 58-17 on section 31.

Q. Does any other occur to you?

A. Well, when we were examining land in the fall south of section 9, there was some shortages in the land there.

Q. Were these instances of excess or shortages?

A. Shortages on that in T. 58-17; shortages in that on section 9 T. 57-17. There was a lake that was not put on the plat at all, but was put on as lands by the Government, and we purchased them from the original owners.

Q. Did you, prior to the purchase being made by Mr. Murphy, include in your report to him or to Robinsin & Flinn any such excess or shortages in these lands?

A. I did not because it occurs so often that we don't pay any attention to it at the time when I make the reports.

Q. When did you first hear of alleged fraud in connection with the survey of Town 57 N. R. 17 W.?

A. I think some time in the fall or spring of 1894. I didn't ever know of any fraud until the settlers went in there that have gone on and made these claims now. It must have been about in 1892 or 1893. before I heard of any alleged fraud.

CROSS-EXAMINATION.

Q. (Fol. 360). Did you have the field notes with you of the Government survey?

A. (Fol. 361). Only the plat, no field notes.

Q. Was anything noted on that plat to show you the length of the boundary lines?

A. No, sir, there was not.

Q. Was there anything to show you the number of acres?

A. No, I didn't have the number of acres, only the number of lots.

Q. You had a copy of the Government plat?

A. Yes, but they didn't put that part on it.

Q. Who made it?

A. Mr. Cary was the Register, but I don't know who made it.

Q. Have you the original memoranda with you from which you made these reports?

A. I have not. I have them at home.

Q. If the copies transmitted by you to the plaintiffs can be found, are you willing that they may produce those originals?

A. As far as I know I think they can. I have not seen them for some time.

Fol. 373. Now, you say in answer to a question addressed to you on the examination in chief that at the time you went over these lands in Township 57, you thought the descriptions on the north side of the lake were larger than they should be?

A. Yes, I thought they were large lots, which we often find in Government surveys.

Q. They were particularly large lots, were they not?

A. I don't know that they were larger than some I have found in Government surveys.

Q. Well, what made you think they were large lots, Mr. Eveleth?

A. Well, the distance from the lake to the town line. The lots run to the town line from the lake with the exceptions of lot 8.

Q. Well, you had heard, hadn't you, that there were pretty large lots out there?

A. No, I didn't hear any such thing. If I had, I wouldn't have spent half a day looking up these lines. I supposed the survey was perfectly correct.

Q. Did you find any squatters or persons on there when you went there?

A. No.

Q. The reports and communications which you made to the plaintiffs in this suit, or to any one of them, respecting this land, prior to, and at the time of, the purchase, were in writing, were they not?

A. Yes, sir.

RE-DIRECT EXAMINATION.

Q. (Fol. 381.) You stated there was no acreage marked on the Government plat of these towns that you had?

A. There was no acreage marked.

Q. When you applied, as a usual thing, to the land office for Government plats, did you request them to include acreage?

A. I don't think that I did. Not as a rule.

Q. Why did you omit information relating to acreage?

A. They didn't put them on the plats.

Q. Was the acreage of any consequence to you. Was it land or timber that you were looking for?

A. It was timber.

Q. Was it for that reason that you omitted asking for the acreage?

A. Yes, for one reason. I don't think I ever asked for acreage, unless it is some piece that I am particular to make a survey on.

Q. Were the corners of the lots, quarter posts and meanders you found at and in the vicinity of the lake sufficient to establish the lots to your entire satisfaction?

A. Why, yes, for my purposes they were, and by my having the plat.

Q. Did the fact that these lots were large enter into the conclusion in your recommending the purchase of this timber?

A. It did not.

Q. In making your estimates, did you estimate closely each separate description

by itself before recommending this purchase?

A. Yes, we intended to do that.

Q. When you stated that the land about the lake that you estimated, included in the purchase, contained from 8 to 10 thousand feet to the acre, did you mean all the land or that merely on sections 3 and 4?

A. I meant that on 3 and 4 and that on 9 and 10, that came from the Graff & Little people.

Q. In your judgment what proportion of all the excess land all around the lake contained pine timber?

A. I should think about one-half of the excess contained timber.

MR. GEORGE O. ROBINSON, recalled and further cross-examined.

Q. (Fol. 393.) Did you find the report made to you by Mr. Eveleth of the estimate which he made when examining these lands prior to your purchase, and which I asked you to look for this morning?

A. Do you mean the estimate prior, or the report prior?

Q. The estimate.

A. Yes, I found these estimates.

RE-DIRECT EXAMINATION.

Q. (Fol. 396.) Were these statistical reports received by you prior to the closing of the purchase on the option you then held?

A. According to my recollection they were received subsequent to the purchase of the Graff & Little lands.

Q. On what did you rely on making the purchase of the Graff & Little tract?

A. On Mr. Eveleth's telegrams, which in brief stated the gross quantity of pine estimated on the entire Graff & Little tract, amounting to 43,000,000 feet of pine, which he thought was as good timber as we could get.

Q. Have you answered on cross- examination that the evidence showed an efficient survey, if any, what real evidence have you that the survey is irregular?

A. Hearsay evidence, and in looking over the maps of re-surveys lately reported to have been made.

Q. What evidence have you that the survey was fraudulent?

A. I have none whatever of any fraud in the original survey.

Q. In the tabulated statements of the woodsman's notes referred to in the cross-examination, is there any reference made to acreage?

A. There is not; our policy was to buy timber and not acres. We made no special count of the exact acreage.

RE-CROSS EXAMINATION.

Q. (Fol. 398.) Mr. Robinson, do you know when you did receive these reports from Mr. Eveleth?

A. (Fol. 399.) I don't recollect the exact date, but to the best of my recollection we received them after we had concluded the purchase of these lands.

Q. You received them before you made the purchase of the Nelson and Scott Griswold lands south of the lake, did you not?

A. I have no positive recolection of it, but I presume that we did.

Q. You say that you think that your information was obtained from telegrams sent by Mr. Eveleth to you after his investigation of the lands. Have you the tele-

grams received and which you referred to?

A. These are the telegrams. (Showing telegrams.)

Q. Will you please read them to the notary and have them incorporated in your deposition?

A. (Witness reads telegrams as follows:)

Duluth, March 10, 1883.

To Robinson & Flinn:

The Graff & Little tract will cut forty-three million good pine and is the best trade that can be made up here. What will I tell them. The other tracts are not good.

ERWIN EVELETH.

Fol. 399.

(Fol. 400.)

Duluth, Minn., March 31, 1883.

To Robinson & Flinn:

Location good. Best pine I have seen up here. If you want timber, take this. There are other parties waiting for it. It is very cheap lands at the price.

ERWIN EVELETH.

(Fol. 401.)

Duluth, Minn., April 1, 1883.

To Robinson & Flinn:

Parties do not want to give extension as there are others that stand ready to pay cash without looking soon as our time is up and as we have ten days after acceptance to close in. Can you not make it out. I think that if we were to pay some money so that they were satisfied they would give me time to go down and show you estimates which are forty-three million white pine 10 per cent. uppers. Don't fail as it is the best trade we will be able to make here. Answer.

ERWIN EVELETH.

PHILLIP M. GRAFF, being one of complainants' grantors in cha'n of title, testified as follows: commencing on fol 411:

Q. I will ask you where you reside, Mr. Graff?

A. Well, you might say that I reside here in Duluth, altho' I have a homestead.

Q. How long have you resided in St. Louis County, Minnesota?

A. I came here in 1879 or 1880 and have been more or less a resident here ever since, as I said before I have a homestead.

Q. What transactions, if any, did you have with Mr. Murphy in 1882?

A. I sold him quite a lot of timber in St. Louis County.

Q. Did you sell him anything else besides timber?

A. No, sir.

Q. I guess you don't exactly understand what I mean; did you sell him any timber lands?

A. We sold him some timber, some lands with timber on, we always figure timber lands by the estimate.

Q. Do you know where the lands were located? can you give a description of them?

A. I don't know as I could locate them specifically; they were in St. Louis County; the deed was made, I think, in the spring of 1883, that is the only transaction that we had with Mr. Murphy, Mr. Simon J. Murphy.

Q. Those were the only lands that you ever conveyed to him?

A. Yes, sir.

Q. Who united in this conveyance with you?

A. Mr. Little and wife and my wife and brother.

Q. Do you know the location of that land with relation to Ely Lake; do you know if any of it borders on the lake?

A. Yes, sir, because we figured on that relation with regard to banking logs.

Q. What was the basis of your sale of this land around Ely Lake that you sold to Simon J. Murphy in 1883; what was the basis of the purchase; what was the consideration?

A. The basis of purchase was on the estimate of timber, it was sold on estimate.

Q. As to this, were the lots bordering on the lake according to the Government plat?

A. We sold them as we received them, according to the Government plat.

Q. What was the limits of estimate on each parcel as to this boundary?

A. The timber was estimated on the boundary as given by the Government plat.

Q. What was the limits of estimate on each parcel as to this boundary?

A. The timber was estimated on the boundary as given by the Government plat.

Q. As running to the actual waters of the lake?

A. Yes, sir.

Q. At the time you sold this land to Simon J. Murphy, had you ever heard of any irregularity or fraud in the surveying of the land in that township?

A. No, sir, I never heard of anything of that kind.

Q. When did you first hear of anything of that character?

A. When suit was commenced with the settlers going in trying to set aside the survey and have it re-surveyed.

Q. How long ago was that?

A. Oh, that was—I don't remember the

exact date, I had no reason to mark the date; it was a few years ago; not over two or three I suppose.

Q. What personal examination did you make as to this title?

A. We had it looked up to see that there was a patent from the Government or that they had filed.

Q. What as to the boundaries of the land?

A. We went by the Government survey.

Q. Or the plat?

A. The survey and the plat.

Q. State whether or not you made a personal examination of the plat in the land office?

A. Yes, sir, I did.

THOMAS H. PRESNELL, in behalf of complainants.

Q. (Fol. 531.) Mr. Pressnell, state your age and occupation and where you reside?

A. I am 56 years old, live in Duruth and am Deputy Clerk of the United States Circuit Court.

Q. How long have you resided here?

A. In Duluth?

Q. Yes, sir.

A. Thirty years.

Q. State whether you know the complainants, Messrs. Murphy, Robinson & Flinn and Dorr?

A. I do.

Q. How long have you known them?

A. Mr. Murphy and Robinson & Flinn I have known since 1882 and Mr. Dorr for four or five years.

Q. State what, if anything, you had to

do with a purchase by Simon J. Murphy in 1883 of lands in sections 1, 2, 3, 4, 9 and 10, in township 57-17 west in this county, I think there were also some other lands in the township north?

A. As agent of Graff & Little I sold those lands to Mr. Murphy, through Robinson & Flinn.

Q. What, if anything, at that time did you—what information, if any, at that time did you give out to these parties with whom you dealt as to any irregularities in the survey in that township?

A. Nothing.

Q. What was the basis of the purchase?

A. The basis of the purchase was pine timber.

Q. The basis of the purchase was pine timber, you say?

A. Yes, sir.

Q. What other conversation was entered into at the purchase on the part of Robinson & Flinn and Messrs Murphy and Dorr?

BY MR. EVANS.

Q. If you know?

A. The negotiations were carried on with Mr. Eveleth, Mr. Erwin Eveleth. I had advertised those lands for sale and had them for sale and he came in my office one day and got an option on the lands. He had a map. I don't remember if he had it at the time he got the option or afterwards, but we looked over that map at the lake with reference to its being a good place to hold logs or something of that kind. I remember that at one time I had shown him the outlet or what was supposed to be the outlet as it showed on the map.

Q. You mean the Government plat?

A. Yes, sir, showing where the St.

Louis River ran there, the lower end of it and a little stream from the lake ran down to it, and where that stream left the lake was a claim owned by C. N. Nelson Lumber Co., I suggested to him that he would easily make an arrangement with the C. N. Nelson Lumber Company to get the use of that stream as an outlet for their logs on the St. Louis River. I don't recollect that we had very much conversation. Mr. Eveleth seemed to know the situation; all he wanted was the option.

Q. Was there anything said at that time about the riparian rights, the right to use the lake and control the outlet, between you and Mr. Eveleth?

A. I don't know as there was anything said, it was understood. For my part I don't know that I had any such conversation.

Q. No more than what you have stated?

A. No, sir.

Q. Did you have anything to do with selling to him this outlet of what you teen supposed to be the lake?

A. I did afterwards; I sold it and some lands north from there, that was another transaction.

CROSS-EXAMINATION.

Q. (Fol. 536.) You say that you had a map of the township?

A. (Fol. 536.) A Government plat.

Q. You had a government plat, was that a blue print of the Government plat?

A. No, it was a common copy generally used. Mr. Eveleth got it from the land office.

Q. Those were copies of the Government plat as filed in the Government land office?

A. I can't say.

Q. It was supposed to be?

A. The officers did not make plats just exactly as they were unless they were ordered to do so. They didn't put in fractions or acreage in common plats, just tracings of the land.

Q. So you could see the boundaries?

A. Yes, sir.

By M. H. Stanford:

Q. This plat had the location of the lake as shown on the Government plat and the streams?

A. Yes, sir.

The foregoing testimony of Elisha H. Flinn, George O. Robinson, Simon J. Murphy, Erwin Eveleth, Phillip M. Graff and Thomas H. Pressnell is not contradicted in a single particular, and no attempt has been made by the defendants to contradict a syllable of the testimony of either of these witnesses.

The Government land in question was patented by the Government, and the land described in such patents as according to the official survey of the said land returned to the General Land Office by the Surveyor General. The Government plat then, and now, of record in the United States Land Office represented these lands as bordering upon the lake. There is no body of water which the meander line would fit except the lake named in the plat, and showing the lake as a boundary. *These lands were not sold by the Government or by complainants' grantors by the acre; the Government sold each lot as an entire tract. Complainants grantors sold the several lots as an entire tract.*

When an assignment is made of a plat and a certificate of survey, the purchaser takes it subject to the risks of its containing a less quantity than is expressed on its face, and should it contain more he is entitled to it.

Kirwan vs. Murphy, 83 Fed., 275.
Vowles vs. Craig, 12 U. S., 8 Cr., 372 (3 L. Ed. 593-597).
Clark vs. Munyan, 22 Pick. 410.

Complainants purchased the land for the pine timber standing thereon, and for the riparian rights thereto; purchased it on the value of the timber estimated to the actual shores of the lake and for the riparian rights valuable to them, not only in connection with the timber standing on the ground which they purchased about the lake, but also to enable them to market a large amount of other timber then, and now, owned by them for which at that time there was no other practical route to market, and which at this time as well is a valuable right there being no other feasable route at the present time except by rail that can be used for marketing this timber. *They purchased the land on the estimate of their woodsmen, relying on the Government plat showing the lake as a boundary, and with no knowledge of any particular excess in the lots.*

The riparian rights which they intended to acquire by this purchase was an important consideration to them.

They purchased the land on Section 2 because

they supposed that the outlet of the lake was at that point.

The land and timber on the western border of the lake in Section 9 was purchased in order that they might control the lake in case they desired to dam the lake as a reservoir. Acquiring of the riparian rights was the controling fact with the complainants in the purchase of the land on Sections 2 and 9.

The fact is established beyond any question *that these complainants purchased and paid for every foot of the land here in controversy. That they purchased all of the valuable riparian rights which Cedar Island Lake affords.* In the face of these well established facts how can it for a moment be claimed that the complainants are not the owners of the land in dispute.

What standing would a private individual have with this Court who occupied the position and made the claim which the Government now asserts.

The Land Department of the United States has through its officers and agents caused this survey to be made; has accepted the report thereof, and the plat made in accordance with the survey; it has approved the plat and made it a public record upon which the world has a right to rely. It has sold the land according to this plat. And now, after the lapse of years, after complainants have bourne the burden of caring for this land, attempt to repudiate its contract and assert that by reason of neglect or unfaithfulness of its agents it has sold more land than it intended, and that innocent parties relying upon the representations of the Government, who

have paid for this property in good faith must, by reason of the unfaithfulness of the Government agents, stand the loss. As a matter of fact, and as disclosed by this record, the interest of the Government in this proceeding is only nominal. The money it would derive, if any, from a re-survey of this land would not pay for the printing of the record in this case. And these settlers who are referred to by defendants' counsel *they have no right which can be considered in this action. They are not parties, and cannot be made parties to this suit; and the Government owes to these settlers no duty, even though the land in controversy was unsurveyed Government land.*

Hutchings vs. Lowe et al., 15 Wall, 77 (21 L. 82).

Buxton vs. Traver, 130 U. S., 232 (32 L. 920).

Gonzales vs. French, 164 U. S., 338 (41 L. 461).

N. P. R. R. Co. vs. Smith, 171 U. S., 269 (43 L. 161).

Norton vs. Evans, 82 Fed., 804.

It would not for a moment be contended *that an individual through his agent could plat a parcel of ground and sell that ground according to such plat, and thereafter could raise a question of fraud or mistake on the part of its agents against subsequent purchasers of the land in good faith according to such plat.* Yet that is the position which the Government occupies in this case; its ostensible ob-

ject in this proceeding is to recover what to it is the value of a few paltry dollars, on the plea that its agents were mistaken or guilty of fraud, to the great injury and damage of the complainants who purchased the land in good faith, relying on the representations of the Government agents, paying the full value on an estimate of the timber on the land extending to the actual waters of the lake and the lake as a boundary. Paying at the time of the purchase for the facilities which the riparian rights furnished for lumbering purposes, and for the outlet to the lake and highway thereby furnished for the transportation of the timber to market.

The complainants being bona fide purchasers in good faith, this is a complete defense to the claims of the Government.

It is fully established by the evidence that the complainants are bona fide purchasers of the land in controversy and without notice, this would be a complete defense against the proposed survey on the part of the Land Department, even though there was fraud in the original survey and the Land Department had erroneously approved of the plat. A complete defense, even though this were an original proceeding on the part of the United States to cancel the patent.

U. S. vs. Cal. & Ore. Land Co., 148 U. S., 31 (37 L. 354-358).

Col. Coal & Iron Co. vs U. S., 123 U. S., 307 (31 L. 182 at 185).

U. S. vs. Winona & St. Peter R. R. Co., 165 U. S. 463 at 482 (41 L. 789 at 797).

U. S. vs. Marshall Silver Mining Co., 129 U. S., 579 (32 L. 734 at 738).

The case of *United States vs. California & Oregon Land Co.* An appeal from a decree of the United States Circuit Court of Appeals for the Ninth Circuit, affirming the decree of the Circuit Court for the District of Oregon, dismissing a suit in equity as to the defendant, the California & Oregon Land Company. This suit was brought by the United States against said company and other defendants for the forfeiture of lands of a wagon road grant in Oregon to the United States, and to set aside the patents issued for such lands.

Said Mr. Justice Brewer speaking for the Court:

> "The burden of complaint in this case is that the Circuit Court erred in restricting the scope of the inquiry. The Government sought to introduce testimony to show that the road was never in fact constructed as required by the act of Congress and also that the certificates of the Governor were obtained by fraud and misrepresentation as averred in the bill. But all of this testimony was excluded and the inquiry limited to the single question, whether the land company was a bona fide purchaser. (Page 37). The act of 1874, which took effect intermediate the first and second deeds from

the road company, provided that when the roads were shown by the certificate of the Governor of the State of Oregon, as in said act provided, to have been constructed and completed, patents for said lands should issue in due form to the state or its grantees. Now, it is familiar law that where jurisdiction is delegated to any officer or tribunal his or its determination is conclusive.

"U. S. vs. Arredondo, 31 U. S., 6 Pet., 691-729 (8 L. 547-561).

"It is an universal principle that where a power or jurisdiction is delegated to any public officer or tribunal over a subject matter, and its exercise is confided to his or their discretion, the acts so done are binding and valid as to the subject matter, and individual rights will not be disturbed collaterally for anything done in the exercise of that discretion within the authority and power conferred. The only question which can arise between an individual claiming a right under the acts done and the public or any person denying its validity are power in the officer and fraud in the party; all other questions are settled by the decision made or the act done of the tribune or officer. (Page 43, citing a number of cases). The testimony shows that the purchaser knew nothing wrong in respect to the title or the proceedings of the road company or any official connected with the transfer of title. They knew that determination of the question as to the completion of the road was committed by the statute to the Governor of the state. They saw his adjudication upon that question, and it may well be held that they took all the active measures which under the circumstances they could be required to take when they ascertained that

the authorized official, and that official the chief executive of the state, had officially determined that the road was completed. There being nothing in the circumstances surrounding the parties to suggest a suspicion of wrong. Can it be that they can be adjudged derelict in diligence because they did not make a personal examination of the road and determine for themselves whether it was in its entire length complete so as to satisfy all the terms of the grant? *If a patent from the Government is presented, surely a purchaser from the patentee is not derelict and does not fail in such diligence and care as are required to make him a bona fide purchaser because he relies upon the determination made by the land official of the Government in executing the patent and does not institute a personal inquiry into all the anterior transactions upon which the patent rested."*

The facts in the case and the question of good faith and bona fide purchase correspond to the circumstances under which complainants in the case at bar purchased the land.

On page 42 says Justice Brewer:

"The purchase was made by a party of gentlemen living in California, in the spring and fall of 1874. The first purchase being of an undivided one-half and the second purchase of the remaining moiety. Ten persons were named as grantees in the first deed and eleven in the second, some of whom were also grantees in the first. The title remained thus distributed among these several individuals until 1877, when for convenience in the care and sale of the property, they all united in a conveyance of their respective

interests to the California & Oregon Land Company of which they were stockholders. * * * * * * *

"More than half of the parties interested in the purchase died before the taking of testimony in this suit. The survivers were all called as witnesses and each for himself testified as strongly as language could make it that his purchase was made in good faith, that he had no knowlelge of any defect in the title. There was no opposing testimony, and if the question be one of simple fact there can be no doubt that the parties were bona fide purchasers within the rule laid down in Second Pomeroy's Equity Jurisprudence, Sec. 745, to-wit:

" 'The essential elements which constitute a bona fide purchase are therefore three: a valuable consideration, the absence of notice and presence of good faith. * * * * * *'

"In this connection it is worthy to notice that the purchasers, when their attention was called to the fact that this property was for sale, sent an agent to Oregon to examine into the matter. While such agent is dead, and what he ascertained is not offered, yet it does appear that, to the survivors at least of the purchasers, he brought no intimation or suggestion of any defect in the title to the land." (P. 42).

In principle, there is no difference between the case at bar and this. In the case at bar the complainants relied upon the decision and action of the Land Department of the United States and the record it had made, and purchased land for the timber thereon and the riparian rights which the purchase afforded by the lands bordering on the

actual waters of the lake, and the plea that they are bona fide purchasers furnished a complete defense.

In Colorado Coal & Iron Co. vs. U. S., 123 U. S., 307 (31 L. 182).

From the opinion of Justice Mathews speaking for the Court:

> "It is fully established that there were in fact no actual settlements and no improvements on any of the lands, as falsely set out in the affidavits in support of the pre-emption claims and in the certificates issued thereon. This undoubtedly constitutes a fraud upon the United States sufficient in equity as against the parties perpetrating, or those claiming under them with notice of it to justify the cancellation of the patents issued to them, but it is not such a fraud as prevents the passing of the legal title by the patents; it follows that, to a bill in equity to cancel the patents upon these grounds alone, the defense of a bona fide purchase for value without notice is perfect.
>
> "In this case there were fourteen persons examined as witnesses, in the first place in respect to several tracts of land in controversy for facts that they had not been settled upon and that no improvements had been made upon them by any one; that they were acquainted at the time of the transactions with the people then living in Las Animas County, some of them stating that they knew every white man at that time residing therein. That, with the exception of one man named Martin, there were no persons in the county at the time bearing the names specified as pre-emption claimants and no persons bearing the names sub-

scribed as witnesses to their statements; and they never saw or heard of persons residing in the county having such names. There is no proof to connect the Register and Receiver with such a conspiracy, but that the affidavits purport to have been made before them and were certified by them. Hunt's connection with it rests upon the fact that he procured deeds from the supposed grantees conveying the land to Jackson in pursuance of a bargain with him. It may well be admitted that if there were no actual persons who made application as pre-emption settlers, none who made and signed the necessary documents and affidavits, and no persons as witness who attested the same, the register and recorder must have known the facts. But the fact of the conspiracy depends upon prior proof that the alleged transactions were mere fiction. Proof necessary to justify that conclusion is supposed to be found in the facts testified to by the witnesses, a summary of which has been given."

I call the Court's attention to this case in particular by reason of the facts which strongly tend to support the allegation of fraud on the part of certain stockholders of the defendants corporation and, notwithstanding the strong circumstantial proof, the Court held it not sufficient to overcome the presumption in favor of the claimants under the patent title.

What does this record disclose upon which the defendants can charge want of good faith on the part of the complainants in purchasing the land? Good faith is held to be the opposite of fraud. It means with an honest purpose.

Docter vs. Furch, 91 Wis. 461.
McConnell vs. Strett, 17 Ill. 253.
Winter vs. Haines, 84 Ill. 585.
Thomas vs. Sioux Falls National Bank, 150 U. S. 240.
Morgan vs. Hazelhurst Lodge, 53 Miss. 683.

Justice Brewer in U. S. vs. California & Oregon Land Company, Supra., concisely states the rights of the complainants in this case in that respect: "If a patent from the Government is presented, surely a purchaser from the grantee is not derelict and does not fail in such diligence and care as are required to make him a bona fide purchaser because he relies upon the determination made by the land official of the Government in executing the patent, and does not institute a personal inquiry into all the anterior transactions upon which the patent rested." * * * I quote further from his opinion in this case: "The survivors were all called as witnesses and each for himself testified as strongly as language could make it that his purchase was made in good faith, that he had no knowledge of any defect in the title. There was no opposing testimony. And if the question be o- of simple faith there can be no doubt that the parties were bona fide purchasers."

In the case at bar the testimony of all of the complainants who had anything to do with the original purchase of this land, is as positive and definite as to the purchase of the land in good faith as language could make it.

The same is true as to the question of notice. It is very clear from the language of Justice Brewer, just referred to, that there was nothing in the circumstances of this case which made it the duty of the complainants to inquire into the regularity and accuracy of the survey. And while we now insist, as we always have done, that the question of the inaccuracy of the survey is immaterial—that the question of excess in the acreage in the fractional lots is immaterial—yet if it were a proper subject of inquiry before this court, there is absolutely nothing upon which the claim of notice can be based, and the testimony of the complainants and of the witnesses Graff, Pressnell and Eveleth negatived any claim of actual notice.

IV

A patent for land is the highest evidence of title and is conclusive as against the Government and all claiming under junior patents of title, until set aside or annulled, unless it is absolutely void on its face.

U. S. vs. Stone, 2 Wall., 525 (17 L. 765).

Hooper vs. Scheimer, 23 How., 235 (16 L. 452).

Johnson vs. Towsley, 13 Wall., 72 (20 L. 485).

Gibson vs. Chouteau, 13 Wall., 92 (20 L. 534).

U. S. vs. Throckmorton, 98 U. S., 61 (25 L. 96).

Warren vs. Van Brunt, 19 Wall., 646 (22 L. 219).

Mahn vs. Harwood, 112 U. S., 354 (28 L. 669).

St. Louis Smelting and Refiining Co. vs. Kemp, 104 U. S., 636 (26 L. 875).

It will not be claimed for a moment that the several patents are void upon their face; what then would be the result of the making of a re-survey? The Government would have no authority to sell any portion of this land again, it could convey no title, yet in making the survey its avowed purpose is to sell and patent a portion of complainants' land. No other result could follow this act than a multiplicity of suits; and the complainants being the owners of the land in question, the Circuit Court had ample authority to enjoin an act which would cast a cloud upon the title of complainants' land, and which would also cause a multiplicity of suits.

It is evident that it was the intention of the Government when it placed this land upon the market and offered it for sale according to the official plat of the township, to sell these fractional lots and convey them to the patentees with the lake as a boundary. I is certainly conclusively established that the complainants when they purchased this property intended to obtain and for that purpose paid for the riparian rights which these lots bordering on the lake afforded. The intention of the

parties, therefore, is manifest; and *it is a fundamental principle of construction of deeds and patents, that the intention will control without regard to mere technical or artificial rules of construction.*

Witt vs. St. Paul & N. P. Ry Co., 38 Minn., 122, 127.

Austrian vs. Davidson, 21 Minn., 117.

Everett vs. Continental Insurance Co., 21 Minn., 76.

Driscoll vs. Green, 59 N. H. 101.

Crafts vs. Hibbard, 4 Met., 438, 452.

Jackson vs. Marsh, 6 Cow. 281; 2 Devl. Deeds Sec. 851, 1033.

Cannon vs. Emmans, 44 Minn. 298.

Moran vs. Lezotte, 54 Mich. 90.

R. R. Co. vs. Stigler, 61 N. Y. 348, 351.

It is an universal rule that courses and distances yield to natural and ascertained objects.

Newsom vs. Priors Lessee, 7 Wheat., 8 (5 L. 382).

Barclay vs. Howell's Lessee, 6 Pet., 498.

Preston Heirs vs Bowmar, 6 Wheat., 580 (5 L. 336).

Brown vs. Huger, 21 How., 62 U. S., 305 (16 L. 129).

Morrow vs. Whitney, 95 U. S., 551 (24 L. 456).

Bartlett Land & Lumber Co. vs. Saunders, 103 U. S., 316 (26 L. 546).

Ayers vs. Watson, 113 U. S.,'594 (28 L. 1093).

St. Clair County vs. Lovingston, 23 Wall., 46 (23 L. 59).

Yanish vs. Tarbox, 49 Minn., 268 at 277 (51 N. W. R. 105).

V

This survey cannot be questioned in this proceeding.

On previous hearings of this case the defendants have stated that it is a conceded fact that the interior of this township has never been surveyed. It is possible that defendants' counsel may assume that position before this Court. We now most strenuously deny, as we have always denied, this assumption. It is established in this case and undisputed that a survey of this township was made; and if the words used in the stipulation of fact amounted to an express admission that no survey of this township was ever made, this Court would not be relieved from the consideration of this question. In the language of Justice White who delivered the opinion of the Court in the case of Stoneroad vs. Stoneroad, 158 U. S. 247, (39 L. 968); "This admission is in no way the concession of a fact, but is a declaration by the suitors of this opinion on a matter of law."

The following are the established facts and un-

disputed, and from these facts the Court will determine as a matter of law that a survey of the township and of this land was made.

The Court will observe that it is alleged in the bill, commencing at Fol. 6 of the Printed Record, that a contract was duly made by the Government for the survey of this township with one Henry S. Howe, as Deputy Surveyor of the United States, bearing date April 26, 1876; that all of the lands in said township were surveyed; that it was completed on the 30th day of June, of the same year, and the record of the survey and the field notes were duly approved by the Surveyor General of the United States. That from the field notes of the survey the plat of said township was duly made by the Surveyor General and submitted to the Commissioner of the General Land Office of the United States for his approval. That on the 11th day of June, 1879, the Commissioner of the General Land Office approved of the plat, and the plat was thereupon filed and recorded in the office of the Surveyor General of the United States for the District of Minnesota, and thereupon became and ever since has been and now is the official Government plat of said township; that after the approval and recording of said plat, and before the sale and disposal of any lands in said township, a duly certified copy of said official plat was made and filed in the office of the Commissioner of the General Land Office of the United States at Washington, D. C., and in the local Land Office at Duluth, Minnesota, that being the land district in which the lands were situated. That after the filing of the copies of said

plat, and prior to April 1, 1887, all of the lands in said township were sold and disposed of by the Government of the United States according to the said official Government plat, and patents of said lands were duly issued therefor to the several purchasers thereof, according to said plat. The bill then avers that there are certain inaccuracies in the survey; the defendants allege in their answer as though it were alleged in the bill, which it was not, that the survey was fraudulent; that Howe fraudulently made and filed pretended field notes of the survey. The defendants then allege that a plat was thereafter made and approved by the Surveyor General of the District; that the Commissioner of the General Land Office approved of the survey and plat Fol. 109 Record; that a copy of the official plat of the township is attached to the bill, Ex. "A" page 15, Record. Defendants by their answer admit that this is substantially a correct copy, Fol. 110-111, Answer. A copy of the field notes of the Howe Government survey was offered in evidence, commencing at Fol. 607, page 203 Record; the Government plat of the township, complainants' Ex. "A," was also offered in evidence. Both the plat and the field notes were received without objection, Fol. 561 Record. In the stipulation of facts (Fol. 301-302 Record) it is stipulated that there is no evidence upon the ground that any actual survey of Township 57 was ever made by said Howe. The Court will note the language "no evidence on the ground."

It therefore appears a sa conceded fact that a survey was made, field notes returned, plat made and approved and filed in the proper offices, and

the land sold according to this Government plat. And, under the same stipulation of facts in Fol. 309, it is admitted that prior to the commencement of this suit, the United States had patented according to the Howe survey, which is the only Government plat of said township, all the fractional lots in said township reported in the field notes returned by said Howe, and all other land in said township outside of the meander line of Cedar Island lake shown by the field notes and plat of the said Howe survey had been patented by the Government.

It is admitted that there is no evidence on the ground that any meander line of said lake was ever surveyed by said Howe, or any meander posts set out by him about the lake, except one where the North line of said township encounters said lake As a matter of fact meander lines are seldom run on the ground. It is admitted in subdivision IX of the stipulation of facts (Fol. 309) that the complanants are the grantees and holders by mesne conveyance from the patentees of the record title to the fractional lots, which the complainants in their bill allege they purchased and are the owners of.

It is an established fact in the case that the complainants purchased the land in good faith relying upon the Government plat, with no knowledge of any inaccuracies in the survey; paying for the land on an estimate of the timber to the actual waters of the lake, and for the riparian rights which the lake afforded.

Under such a *state of facts, we maintain that this survey is not open to challenge. That the*

Government of the United States is estopped from disputing the accuracy of this survey.

All lands are supposed to be actually surveyed.

White vs. Burnley, 61 U. S. (20 How.) 235 (15 L. 886).

McIver's Lessees vs. Walker, 9 Cranch, 178 (3 L. 696).

Newsom vs. Priors Lessees, 7 Wheat., (5 L. 382).

A.

The doctrine is general that when the law has confined to a special tribunal the authority to hear and determine certain matters arising in the course of its duties, the decision of that tribunal within the scope of its authority is conclusive upon all others.

Marbury vs. Madison, 5 U. S., 1 Cranch, 170 (2 L. 71).

Johnson vs. Towsley, 80 U. S., 13 Wall., 72 (20 L. 486).

Cragin vs. Powell, 128 U. S., 691, 699 (32 L. 566-8).

Knight vs. U. S. Land Ass'n, 142 U. S., 161 (35 L. 974).

Stoneroad vs. Stoneroad, 158 U. S., 240 (39 L. 970).

Russell vs. Maxwell Land Grant Co., 158 U. S., 253 (39 L. 971).

U. S. vs. Cal. & Ore. Land Co., 148 U. S., 43 (37 L. 360).

U. S. vs. Marshall Silver Mining Co., 128 U. S., 43 (32 L. 574, 576).

U. S. vs. Marshall Silver Mining Co., 129 U. S., 579, 589 (32 L. 737, 738).

Uhl vs. Reynolds, 64 S. W., (Ky.) 498 at 500.

Said Judge Brewer speaking for the Court in United States vs. California & Oregon Land Co., at page 43:

> "Now, it is familiar law, that when jurisdiction is delegated to any officer or tribunal, his or its determination is conclusive."

Again, it was held in this Court in Menards Heirs vs. Massey, 8 How. 292, 314 (12 L. 1085 at 1073) which arose under an old Spanish concession and a title otherwise acquired, that when it (the survey) was made, and the field notes returned to the Surveyor General's office and the description and plat made out in form and approved by the Surveyor General, it was conclusive evidence as against the United States that the land granted by the confirmation of Congress was the same described and bounded by the survey, unless an appeal was taken by either party, or on applying to the Commissioner of the General Land Office.

This consideration depends on the fact that the

complainants and the United States were parties in the selection of the land. As they agreed to the survey, they were mutually bound and estopped by it. This is affirmed in:

Gutard vs. Stoddard, 16 How., 512 (14 L. 1038).

City of Carondlet vs. City of St. Louis, 66 U. S., (1 Black 179) (17 L. 106).

Dent vs. Emmeger, 81 U. S. (14 Wall. 308) (20 L. 838 at 839).

Russell vs. Maxwell Land Grant Co., 158 U. S., 253 (39 L. 971).

and other cases in this subdivision.

The case of *Cragin vs. Powell*, 128 *U. S.*, 691 *to* 700 (32 *L.* 566) is a case on all fours with the one at bar regarding the conclusiveness of the Government survey. In this case the original Government survey was made in 1837, by one G. W. Connelly, as part of the public domain, and the plat of such survey was filed in the United States Land Office of the District. In 1844 the United States issued to one Bach patent to ascertain portions of this land in Sections 10, 15 and 22 according to the official plat of the survey of said lands returned to the General Land Office of the United States by the Surveyor General. The appellant was the owner of the land thus patented to Bach. In April, 1874, one Samuel Wolf purchased from the State of Louisiana portions of the same Sections, 10, 15 and 22, and also portions of Sections 14 and 23, same township, all joining the lands of the appellant.

These lands last described were given to the state as swamp lands and were noted as such on the official plat above referred to. By the Connelly plat a bayou known as Bayou Four Points is located on appellants' land. The appellees claiming under the Wolf patent offered to prove, and did prove, that the original Government plat was inaccurate, and claimed that the appellants' land was not in fact situated on Bayou Four Points; that there was a strip of Government land left unsurveyed which did not pass to appellants' grantors and was claimed under the Wolf patent from the State. Said Justice Lemar who wrote the opinion of the Court:

> "Whether the official survey made by Connelly is erroneous or should give way to the extent of its discrepancies to the survey reported by McLeran, is a question which was not within the province of the Court below, nor is it in the province of this Court to consider and determine. The mistakes and abuses which have crept into the official surveys of the public domain form a fruitful theme of complaint in the political branches of the Government. The correction of these mistakes and abuses has not been delegated to the judiciary, except as provided by the act of June 14, 1860, in relation to Mexican land claims which was repealed in 1864. From the earliest days matters appertaining to the survey of public or private lands have devolved upon the Commissioner of the General Land Office, under the supervision of the Secretary of the Interior. Revised Statutes, Sec. 453. * * *
>
> "The making of re-surveys or corrective surveys of townships once proclaimed for

sale is always at the hazard of interfering with private rights and thereby introducing new complications. * * * * * * *

"That the power to make and correct surveys belongs to the political department of the Government, and that, whilst the lands are subject to the supervision of the General Land Office, the decisions of that bureau in all such cases, like that of other special tribunals upon matters within their exclusive jurisdiction, are unassailable by the Courts, except by direct proceeding; and that the latter have no concurrent or original power to make similar corrections, if not an elementary principal of our laws is settled by such a mass of decisions by this Court that its mere statement is sufficient." (Then follows a long line of cases.)

Cragin vs. Powell is expressly affirmed in Knight vs. Land Ass'n, 142 U. S., 161 (35 L. 974) and again in Stoneroad vs. Stoneroad, 158 U. S., 248 (39 L. 969) and Horn vs. Smith, 159 U. S., 40 (40 L. 68) and French Glenn Live Stock Co., vs. Springer, 22 Sup. Rep., 566.

The direct proceedings referred to as is stated in Col. Coal & Iron Co. vs. U. S., 123 U. S., 307 (31 L. 182) and in U. S. vs San Jacinto Tin Co., 125 U. S., 273 (31 L. 751), the Court said of these transactions:

"When fraud is alleged and conclusively established that they undoubtedly constituted a fraud upon the United States sufficient in equity as against the parties perpetrating it or those claiming under them with notice of it to justify the cancellation of the patent issued to them; but not

> against a bona fide purchaser for value without notice, and in no case except by proceeding in equity on the part of the Government to cancel the patent."

And in *U. S. vs. Minor,* 114 *U. S.*, 233 *at* 244 (29 *L.* 110 *at* 114).

> "Where the patent is the result of nothing but fraud and perjury, it is enough to hold that it conveys the legal title, and would be going quite too far to say that it cannot be assailed by a proceeding in equity and set aside as fraud, if the fraud is proved and there are no innocent holders for value."

This was a suit in equity by the United States against the patentee to set aside and anul a patent.

Indeed it would be an unheard of proposition *that a person in no way connected with the fraud and without notice that one had been perpetrated, who purchased the property in good faith and for a valuable consideration, could be deprived of it on the ground that fraud had been perpetrated on the Government in making the survey.* The Court will remember that neither the patentees nor the complainants or any of the grantees in the complainants' chain of title, are charged with fraud in the original survey, or any notice or knowledge that a fraud was perpetrated. Neither are they charged with any notice or knowledge that there was a mistake in the original survey.

The testimony is conclusive that the complainants purchased the land in good faith, paying for it on an estimate of the timber on the land running

to the actual waters of the lake relying on the Government plat; and that a controling consideration which induced the purchase by them was the riparian rights which they acquired by reason of the land being bounded by the actual waters of the lake.

In *U. S. vs. Marshall Silver Mining Co.*, 129 *U. S.* 579 *to* 598 (32 *L.* 734 *at* 738) this Court held:

> "That where one of the defendants in an action to set aside a patent issued by the United States Land Office is an innocent purchaser of the property, the patent will not be set aside."

And in *U. S. vs. San Jacinto Tin Co.*, 125 *U. S.* 273 (31 *L.* 747 *at* 752). where a suit is brought by the United States to benefit one or two claimants to land, the Government has no pecuniary interest in the matter and the suit must fail.

And in *U. S. vs. Beebe*, 127 *U. S.* 388 (32 *L.* 121 *at* 125) this Court held that the United States may sue to set aside a patent for land obtained by fraud or mistake, only when the Government has an interest of its own to protect, or it is under obligation to some individual to make his title good by setting aside the fraudulent title, or its duty to the public requires such action. Again,

> "We are of the opinion that when the Government is a mere formal complainant in a suit, not for the purpose of asserting any public right or protecting any public interest, title or property, but merely to form a conduit through whom one private person can conduct litigation against another private person, a Court of Equity will not be re-

> strained from administering the equities existing betwee nthe real parties by any exemption of the Government designed for the protection of the rights of the United States."

White vs. Bunly, 20 How., 235 (15 L. 889) the Court says it is probable no actual survey was made on the ground and hence it appeared that the surveyor's certificate that more than one-half of the boundary shown on the plat was covered by water.

B.

Russell vs. Maxwell Land Grant Co., 158 *U. S.*, 259 (39 *L.* 973). Judge Brewer in closing his opinion in this case used the following language:

> "In this connection it may be well to notice a distinction which interprets some dicta and decisions found in respect to the jurisdiction of Courts over boundaries. Whether a survey as originally made is correct or not is one thing, and that as we have seen, is a matter committed exclusively to the Land Department, and over which the Courts have no jurisdiction otherwise than by original proceedings in equity. While on the other hand, where the lines run by such survey lie on the ground, and whether any particular tract is on one side or the other of that line, are questions of fact which are always open to inquiry in the courts."

In the case before us the offer was not to show

that the land in controversy was on one side or the other of the line established by the survey. On the contrary, it was conceded that it was within the limits of the survey, and the offer was simply to show that the survey was inaccurate and that the lines should have been run elsewhere, but this is not a matter for inquiry in this collateral way in the Courts.

Again, in *Horn vs. Smith* there was two water lines before the Court, both on the ground; and the question was which of these water lines constituted the boundary, the bayou or the main body of the river. Said Justice Brewer speaking for the Court, page 43 (Law. Ed. page 70).

> "That a water line runs along the course of the meander line cannot, of course, in the fact of the plat and survey, be questioned; but that the meander line of the plat is the water line of the bayou rather than that of the main body of the river is evident from these facts."

It will be noticed that Justice Brewer in his opinion expressly declares *that the meander line cannot in the fase of the plat and survey, be questioned; but the Court is bound to presume that the water line runs along the course of the meander line.* This accords with the distinction which Justice Brewer points out in Russell vs. Maxwell Land Grant Co., that the correctness of the survey cannot be questioned by the Courts, except by original proceeding, to which we have heretofore referred, and is in harmony with all the decisions of this Court.

In the case at bar it is admitted that the lines which defendants dispute do not lie upon the ground; and the defendants' contention is that they were never run. *The boundary line they dispute is plain and open to be seen; they do not seek to show that the tract should be on one side or the other of the actual shore of the lake, but that the line described in the survey, that, is the lake shore is inaccurate.* This is an attempt to do what Justice Brewer has so clearly and concisely held they cannot do.

If it were competent for the defendants to show in this action that no survey of said township was ever made by the Government, as they insist upon the right to do, and the fact was established, as they claim it has been, that the township never in fact was surveyed, if such proof were admissible and the fact was established, there would not be one foot of ground in this township which the Government has patented which does not at this time belong to the Government of the United States. If their contention is true on the law and the fact, then the Government of the United States may today maintain an action for every ton of ore which has been removed from any portion of the land in this township, which it has assumed to patent, and for every foot of timber which has been cut and removed by the parties claiming to own such by virtue of such patents. If such contention is true, it does not relate to the land only which lies between the meander line of Ely Lake and the actual waters thereof, but it must extend to every piece of land which the Government of the United States has heretofore patented in this township...

VI.

One Officer of the Land Department cannot cancel or annul an act of his predecessor so as to effect private rights.

The action of the Commissioner of the General Land Office in ordering the survey in question is, in fact,, a cancellation of the order of his predecessor in approving of the survey and official plat. It is in effect the re-forming of the patents which his predecessor ordered issued in behalf of the Government, and by such reformation of the patents taking from the complainants a considerable portion of the land and a valuable privilege which the riparian rights to such lands represent.

It is a well settled rule promulgated by this Court and re-affirmed in every instance where the question has come before it, so far as I am able to learn, that one officer of the Land Department is not competent to cancel or annul the act of his predecessor. Most of the cases which we have cited in this brief declare this proposition either direct or by inference. The following are a few of the cases in which the question has been expressly passed upon:

Stone vs. U. S. 69 U. S., 2 Wall., 525 (17 L. 767).

Moore vs. Robbins, 96 U. S., 6 Otto., 530 (24 L. 850).

Noble vs. Union River Logging Co., 147 U. S., 165 (37 L. 123 at 127).

In the last case cited, the Court used this language:

> "That if the right of way were obtained by fraud, a bill would undoubtedly lie by the United States for cancellation and annulment of the approval thus obtained, but that a revocation of the approval of the Secretary of the Interior by his successor in office was an attempt to deprive the plaintiff of its property without due process of law.
>
> "And the decree enjoining the Secretary of the Interior and the Commissioner of the General Land Office from executing the order revoking was affirmed."

All of these cases hold, and it has been so decided by this Court as often as the question has come before it, that the meander line is not the boundary, but that the body of water whose margin is meandered is the true boundary.

VII.

RIPARIAN RIGHTS.

It has been contended by the complainants in the previous hearings of this case, that the subject of riparian rights was not a question in this case, and that the authorities cited related to accretion and reliction, and, therefore, have no application to the case at bar. All of the cases which we have cited by this Court on the question of boundaries have held against this contention of the appellants.

Accretion and reliction are goverened by the same principles as other rights of riparian ownership, that is, the right of access to the water. It is in order to make the right of access complete and available that the right of accretion or reliction is allowed. Accretion and reliction stand on no different ground than the rights of the complainants in the case at bar.

In re Delinquent Taxes St. Paul & Duluth Ry. 84 N. W. (Minn.) 302.

Lampry vs. State, 52 Minn., 98.

G. R. & I. Ry. Co. vs. Butler, 159 U. S., 87 (40 L. 85).

Hardin vs. Jordan, Supra.

And cases cited in Minnesota.

In the case of *Lewis vs. Pierce*, 18 *L. Decision*, 328, decided in 1894 by Secretary Lemar where a survey was denied. In a similar case the Secretary gives the following reasons for his refusal:

> "In the appeal under consideration, however, it is claimed that the land in question cannot be an accretion, as timber is growing thereon more than 100 years old, (the survey was made in 1845) that there must be a mistake in the original survey, and to ascertain the facts a hearing is desired. To admit that there was a mistake in the original survey could not to my mind alter the case, for it is not claimed that even if a mistake has been made Gleason was in any wise responsible for it, or that it was made through his connivance. He made en-

> try fifteen years after the survey of 1845, and his contract with the Government was based upon the recognized plat then on file This assured him of a water front, and undoubtedly this fact influenced his selection of the land. This being so, no subsequent survey can deprive him of his frontage on the water."

This case is on all fours with the one at bar, and we submit that here, as in the Pierce case, the complainants are entitled to their frontage on the water. And an attempt to distinguish this case from the general doctrine announced by this Court is futile.

The reasons stated by Mitchell, Justice in Lamprey vs. State, 52 Minn., 192 at page 197, in relation to accretions and relictions, could not more clearly state the situation of the parties in the case at bar. It is as follows:

> "The incalculable mischiefs that would follow if a riparian owner is liable to be cut off from access to the water, and another owner sandwitched in between it and him, whenever the water line has been changed by accretion and relictions, are self-evident and have been frequently animadverted on by the Courts. These considerations certainly apply to riparian ownership on lakes as well as on streams. Take the case in hand of our small inland lakes, the waters of many of which are slowly but gradually receding. The owners of lands bordering on them have often bought with reference to access to water, which usually constitutes an important element in the value and desirability of the land. If the

rule contended for by the appellants is to prevail it would simply open the door for prowling speculators to step in and acquire title from the state, to any reliction produced in the course of time by the recession of the water, and thus deprive the owner of the original shore estate of all riparian rights, including that of access to the water. The endless litigation over the location of the original water lines, and the grevious practical injustice to the owner of the original riparian estate that would follow, would of themselves be a sufficient reason for refusing to adopt any such doctrine. That the state would never derive any considerable pecuniary benefit, certainly none that could at all compensate for the attendant evils, we may in the light of experience safely assume. Our conclusion, therefore, is, that upon both principle and authority, as well as consideration of the public policy, the common law is, that the same rules as to riparian rights which apply to streams, apply also to lakes or to other bodies of still water."

Said Justice Bradley in Mitchell vs. Smale, Supra:

"We think it a great hardship, and one not to be endured, for the Government officers to make new surveys and grants of the tracts of such lakes after selling the land bordering thereon, or represented to be. It is nothing more nor less than taking from the first grantee a most valuable, and often the most valuable of the grant."

Chief Justice Fuller in *Grand Rapids & Indi-*

ana Railroad Co. vs. Butler, 159 *U. S.,* 87 (40 *L.* 85), in a suit to quiet title, speaking for the Court, quotes with approval the language of Justice Bradley in Harden vs. Jordan, Supra.:

> "We think it a great hardship, and one not to be endured, for the Government officers to make new surveys and grants of the bed of such lakes, after selling and granting the lands bordering thereon, or reported to be. It is nothing more nor less than taking from the grantee a most valuable part of his grant. Plenty of speculators will always be found as such property increases in value, to enter it and deprive the proper owner of its enjoyment. And to place such persons in possession under a new survey of the grant, and put the original grantee of the adjoining property to his action of ejectment and plenary proof of his own title, is a cause of vexatious litigation which ought not to be created or sanctioned."

This was a case in which Butler who claimed title on an original survey to an island in Grand River which did not appear in the original survey. In the state of Michigan the land of the riparian owner extends to the thread of the stream in non-navigable waters. This island was on Butler's side of the stream, it passed by the original grant and a subsequent survey by the Government of this island, and the patent issued by the Government to the railroad company did not divest Butler of his title.

If there was no proof that the lands were purchased by the complainants in reliance on the riparian rights disclosed by the plat, the question of

riparian rights would still be a controlling element in this case.

Said Chief Justice Marshall in Newsom vs. Pryor's Lessee:

> "Generally speaking, it is the particular intention of the purchaser to acquire the land lying on the stream called for, as being more valuable than other land."

Said Justice Swayne in *St. Clair County vs. Livingston*, 90 *U. S.*, 23 *Wall.* (23 *L.* 63.)

> "There was an obvious advantage in having the entire front of the land extend to the waters edge."

It would seem unnecessary to dwell on this question of riparian rights, or to speak further of the attempt on the part of the defendants to eliminate it from the case. The rule is well settled by an uninterrupted line of the decisions of this Court, from its earliest history to the present time, that the owner of lands bordering on navigable waters is entitled to and does hold riparian rights therein.

VIII.

The Survey and Plat having been approved and the land sold, the Plat cannot now be questioned.

The Howe survey and plat was approved by the Commissioner of the General Land Office.

Prior to such approval the land in question was unsurveyed land of the United States. In approving of the survey and of the plat, the officers of the General Land Office exercised their judgment and discretion. It was a power conferred on them by congress.

The land was sold and conveyed according to such official plat. In offering this land for sale and in the sale and conveyance thereof, it then being public lands of the United States, and at the disposal of the Land Department, the officers of the land department acting within the scope of their authority and in the exercise of their judgment and discretion, as delegated to such officers by act of Congress, their decision is conclusive upon all others. Cases cited, also see:

Johnson vs. Towsley, 80 U. S., 72.
U. S. vs. Schurz, 102 U. S., 378-401.
Cragin vs. Powell, 128 U. S., 693.
French Glenn Live Stock Co. vs. Springer, 22 Supra R., 566 and Cases cover cited in substance 2 page 15 & 16 of this brief.

IX.

Complainants Exhibit D. attached to the bill correctly delineates the location of Cedar Island or Ely Lake.

The defendants on previous hearings of this case have, in the face of the undisputed facts, assumed that the location of the lake was different

from that shown on complainants Exhibit D., There is no controversy either in the pleadings or proof as to the location of the lake.

It is alleged in the bill "that the actual boundaries of Cedar Island Lake are as represented on said Exhibit D, surrounding the words 'Cedar Island,' " and this exhibit is made a part of the bill.

Folios 12 and 13, page 5 Printed Record; Plat, Ex. D., page 16 Printed Record.

This is not denied in the answer.

The answer alleges that Exhibit B. attached to the answer represents the true relative size and contour of the lake, but no reference is made to its location.—Fol. 113 Printed Record.

Complainants' Exhibit B. attached to page 73 Printed Record.

The plat Exhibit B. has been assumed as the location of the lake by the defendants in their argument, but there is absolutely no evidence to support it. In 1894 the County Surveyor of St. Louis County, Minnesota, pursuant to the order of the Board of County Commissioners of that county, made a survey of the two northern tiers of sections of this township for the purpose of re-establishing the interior lines and corners. For the petition and order see page 255-6 Printed Record; and the field notes of said survey, page 240 Printed Record. These were introduced in evidence at Fol. 509, page 170.

This survey is known as the Patton or County Survey.—Fol. 509 Printed Record.

Survey is ordered by the Board of County

Sommissioners of St. Louis County, pursuant to section 697, Annotated Statues of 1894, which section is as follows:

COMMISSIONERS TO RE-ESTABLISH SECTION AND MEANDER POSTS.

The Board of County Commissioners of any county where it shall be made to appear to their satisfaction at any regular or special meeting, that the section, quarter section or meander posts or monuments established by the United States have been destroyed, or are becoming obscure, shall have power to authorize and direct the County Surveyor of the County to re-survey, re-locate and re-establish such section, quarter section or meander posts or monuments, by having permanently placed at such Government corners an iron or stone or wood post or monument, of a durable character, of such size and construction as in their discretion may be deemed desirable. In making such survey the said County Surveyor shall keep full and accurate notes thereof, and shall file a certified copy of the same in the office of the Register of Deeds of said county. And the points where said posts or monuments are relocated and reestablished, as aforesaid, shall be taken and considered as prima facie evidence that such points are the points where the section posts or monuments were established by the United States Government."

The correctness of the Patton or County Survey is confirmed by three competent civil engineesr and land surveyors, and it correctly de-

lineates the location of the lakek Testimony of Merritt S. Cook, Fol. 431-2; testimony of C. E. Bailey, Fol. 498-9 504; testimony of J. D. Lamont, Fol. 522-525.

Defendants' Exhibit 1, introduced in evidence at Fol. 584, represents two systems of survey; that of the black lines locates the lake according to the Patton or County Survey.—Fol. 566-7. Defendants' Exhibit 1 and several of complainants' Exhibits, which were introduced in evidence and admitted to be correct copies of complainants' Exhibits, D., attached to the bill, were not printed in the record either in the Circuit Court, the Court of Appeals or in the record in this court; but the originals were used on the hearing in the Circuit Court and by an order entered by Judge Lochren on the 19th day of December, 1900, based on a stipulation of the respective counsel, complainants, original Exhibit D and Defendants' original Exhibit 1 were ordered transmitted to the clerk of the United States Circuit Court of Appeals, Eighth Circuit, to be used no the hearing of the appeal, and were so transmitted.—Page 346 Printed Record. A like order based on the stipulation of the respective counce1 was made by Judge Walter A. Sanborn, one of the judges of the Court of Appeals of the Eighth Circuit, pursuant to which complainants' said original Exhibit "D" and defendants' said original Exhibit 1 were transmitted to the Clerk of this Court, and are now on file herein.

Rules followed in making the Patton or County Survey.

While there is no dispute as to said Exhibit "D" correctly representing the location of the lake, we would call the Courts' attention to the principles which the Patton or County Survey, upon which this Exhibit is based, was made:

It is conceded that the Section, Quarter and other posts on the exterior boundary of the township, as established by the Howe Survey are clear and distinct and readily found and traced, but the interior lines and posts, except the Northwest corner of Section on 36 cannot be found.

Page 101 Printed Record.

We believe that the authorities cited in Subdivision V of this brief firmly establish the rule that the so-called Howe survey of this township was made and cannot be questioned in this proceeding. This being the rule, the interior lines and corners in this township must be established on the ordinary rules of subdivision for lost corners.

Moreland vs. Page, 2 Clark, Iowa, 452.

Jones vs. Kimble, 19 Wis., 452.

Westphale vs. Schultz, 48 Wis., 75

Pereles vs. Magoon, 78 Wis., 27.

Miller vs. Topeka Land Co., 44 Kan., 354.

Newcomb vs. Lewis, 31 Iowa, 490.

Quinnin vs. Reimers, 46 Mich., 605 & 49 Mich., 449.
O'Brine vs. McGraw, 27 Wis., 446—448.

This was the rule adopted in the Patton survey.—Testimony of C. E. Bailey, fol. 507.

It will be remembered that all of the land in this township had been sold and patented by the Government of the United States, according to the official Government plat, previous to the commencement of this suit.—Fol. 309 Printed Record. That all of the lands in the township had been dispose of prior to March 8, 1887.—Certificate of Register of United States Land Office at Duluth attached to the bill, Fol. 39 of Record.

It will also be remembered that the township over-runs about 90 rods from north to south, Fo. 441 and 486, 487, Printed Record, and that there is a deficiency in the width of the township east and west of about the same number of rods, Fol. 506.

The record also shows that the Government field notes and officiel plat exhibit a township pratically square and sections practically equal, —se plat and field notes of the Howe survey, also testimony of Merritt S. Cook, Fol. 487-488 and 495 of Record,—and they also show no surplus or deficiency.

Under the Patton survey the surplus and deficiency is divided proportionately according to the Howe survey, so that each section is prac-

tically equal.—Page 148, Fol. 441-442; page 163, Fol. 486-487-494 and 496; testimony of C. E. Bailey, Fol. 503-504-507, defendant Cresewell fol. 576 and 577.

The rules followed in making the Patton survey, rest on good reason and authority, and are well stated in the case of Moreland vs. Page, Supra. Commencing at page 148:—

> "here is a large body of land, comprising nearly two ranges of sections, on the north part of the township, on which no subdivisional monuments can be found of this body of land in gross, there is less in quantity than is called for in the original survey. Yet we are, as between the parties here, to regard it as a lost survey, and not as never having been made. It must be restored. But upon what principle the court should determine, that the plaintiff was entitled to carve out of his body of land, made up of numerous subdivisional tracts, the full quantity which his patent called for by actual measurment, and leave others, who had purchased other subdivisional tracts of the same body, under the same conditions with himself, a deficiency, we are at a loss to determine. Had this body of land, on which there are no monuments found, exceeded, instead of falling short of, full measurements according to the original survey, the purchasers of the specific tracts included in this body, would have been sharers of the excess in due proportion, and the plaintiff, with others, to his proportion. On the other hand, he should share the deficiency. But it is said, that fractions in subdividing townships, all fall on the north and west

sides of the townships. That is true in making an entirely new survey; but this survey is not an original one; it does exist, at least on paper. The purchasers have all been made in relation to it. The purchaser of a fractional forty acre tract, located on the north or west side of the township, to the extent of the quantity designated in that fraction on the plat, and by the field notes of the original survey, purchased as definite and determined a quantity of land, having as fixed and determined relations to the whole tract, the survey of which is now lost, as did any one who purchased those sevelar tracts not designated as fractional. The person who might purchase a tract on the north side of the township, designated on the official plot of the original survey as containing thirty-nine acres, had as perfect a vested right to receive thirty-nine full acres, as he who purchased a quarter section in any other part of this body, had to the hundred and sixty acres callled for by his patent. If this is true, it follows that the line established by the court below, is not the true line; for it gives full measure from south to north to the plaintiff, while, by so doing, it leaves to the defendant less length of line from south to north, by two and one-half chains, than he would have had, after sharing his proportion of the general deficiency."

Again, on page 150:—

The field notes and plats officially made, certified and deposited in the proper repository; all necessarily enter into the consideration, in attempting to restore a

lost survey made under them. They together, to speak figuratively, constitute the doomsday book of our western states. The dominion of every land holder has relation to them."

And on page 151:—

"When we take into consideration the fact, that the interior section lines east and wetst, through the township, are not right lines drawn across the whole township, but any given one of these lines, is made up of a series of closing section lines, each to some extent independent of the others. These several section lines may, by a remote possibility, constitute a right line across the township. If practical surveyin g could be made as perfect as theoretical, they might form a straight line, but the difference between theory and practice is such, that the fact is, they seldom if ever do; while on the contrary each line across the township from east to west dividing sections, generally has as many distinct courses as there are sections lying on either side of it. Yet, nevertheless, on the principle of subdividing townships adopted by the Government, any one of these lines east and west through the township, so made up, whether straight or crooked, constitutes, in effect, the base line for the survey of all the land lying north of it in the same township; or, to speak more accurately, each separate south section line, is in fact, the base line for the survey of the section lying north of it. Now, the line on the south side of these two tiers of the section is found. Its section corners are all marked."

(In the case at bar it is the exterior lines of the township which are found and marked, instead of the south side of the two tier of sections as in the Moreland—page case.

Again, at page 152,—

> "The monuments all along this line, and all the other monuments all around this body of land, the subdivisional monuments of which are not found, are as absolute, unimpeachable verities, as the two adopted by the court below, or the six claimed by the defendant. The several tracts of land on the plat, in relation to which the several purchases were made, are each as fixed, and have each as determined relations to each other, and to each of these monuments, as they do to any one of those claimed by the defendants. The unknwon corners must be found by the corroborative testimony of all, with as littel departure as may be, from the system adopted on the original survey, without giving any preponderance to the testimony of any one monument above another. In doing this, courses and distances, which are the elements of superficial measure, must yield to the facts, namely, the established monuments. In other words, to use a homely adage, the several garments must be cut, according to the cloth."

And again, on page 153 and page 154,—

> "The second principle, we understand to be, that all ascertained surrounding monuments shall have their due weight in

determining the locality of the unascertained, under the system by which the survey was originally made. Thirdly, that where on a line of the same survey, between remote corners, the whole length of which line is found to be variant from the length called for in re-establishing lost intermediate monuments, as marking subdivisional tracts, we are not permitted to presume merely, that a variance arose from the defective survey of any part; but we must conclude, in the absence of circumstances showing the contrary, that it arose from the imperfect measurement of the whole line, and distribute such variance between the several subdivisions of such line, in proportion to their respective lengths.

"It has been urged by plaintiff that this is not a lost survey, but that a survey has never been made. To adopt this view, would be to defeat his entire title. His patent has relation to a survey which, if it never existed, leaves him without description in his grant. We cannot conclude that there never has been a survey, though it should have been merely imaginary, so far as the interior lines of these two ranges of sections are concerned. For, although imaginary, it has been platted and numbered, and incorporated into the several grants. The purchasers of all the subdivisions numbered on that plat, have purchased with relation, not only to the monuments, but to the township, range, sections and subdivisions of sections, as shown by the plat. And now, as between these purchasers, it would be an enormity to entirely disregard it."

In the Patton survey it was found by running the interior lines of the township *that there was an excess in the length of the township from north to south of about* 90 *rods and a deficiency in its width from east to west of about the same distance. This excess was divided proportionately throughout the entire township, so that the sections were approximately equal in proportion to the field notes of the Howe survey.* This clearly appears from the evidence in the case, not only in the field notes, but from the testimony of the several engineers, including the defendant Croswell, who have testified as to the plan of the survey, and the survey follows the rule declared in Moreland vs. Page.

All of the cases hereinbefore cited in this subdivision follow that rule; and the only difference between that case and the case at bar is in the length and number of the several lines between established corners on the ground on which no monuments are found. In Moreland vs. Page it was a large part of the northern two tiers of sections of the township in which the original survey had been either defectively or fraudulently made, while in the case at bar it covered nearly all interior lines.

The Patton survey is based not only on the rules declared by the courts which are so clearly exponded in Moreland vs. Page, but in making the survey, *the surveyors have followed the directions of the Commissioner of the General Land Office*, wihch were approved by Secretary Teller on the 13th day of March, 1883, and are to be found in a book entitled "The Public Domain" at pages 669, 672 and 673 of the Government publication made

in 1884, and were in force when the Patton survey was made. We quote the following from this document:

To Restore Lost or Obliterated Corners.

1. To restore corners on base and correction lines.—Run a right line between the nearest existing corners on such line, which corners must, however, be fully identified, and at the point proportionate to the distance given in the field notes of the original survey, establish a new corner. This point should be verified by measurements to the nearest known corners north or south of the base or correction line, or both.

Where several corners are missing between the corners to be connected as directed above, their location will be determined upon the same principles and the same manner, that is to say, the original distance of the entire line between the recognized corners is to the entire distance remeasure between the same corners as the original distance of the first, second, third &c., interval of the original survey is to the new distance to be laid off for the corresponding new interval. After having checked such new location by measurement to the nearest known corners north or south of the line, new corners will be established permanently, and new bearings and measurements taken to prominent objects, which should be of as permanetn character as possible, and the same recorded for future reference.

As has been observed, no existing original corner can be disturbed, and it will be plain that any

excess or deficiency in measurements between existing corners cannot in any degree affect the distances beyond said existing corners, but must be added or subtracted proportionately to or from the intervals embraced between the corners which are still standing.

2. Re-establishment of township corners common to four townships.—Inasmuch as township lines are sometimes run in a direction not true north and south, or east and west, a line should first be run connecting the nearest known corners on the north and south township lines and a temporary corner established at the proportionate distance. This will establish the location of the township corner only so far as its relative position north and south is concerned. The nearest known corners on the east and west township lines will then be connected in the same manner, independent of the temporary corner previously set, and the proportionate point determined in that direction; any difference east or west of the temporary corner which may be developed by the last operation, by intersection with the line previously run north and south, will then be laid off in the direction required from the temporary corner, and a permanent corner established at such point, marked and witnessed as in the foregoing case.

3. Re-establishment of interior section corners.—This class of corners should be re-established in the same manner as corners common to four townships. In such cases, when a number of corners are missing on all sides of the one sought to be

re-established, the entire distance must, of course, be re-measured between the nearest existing recognized corners both north and south and east and west, in accordance with the rules laid down, and the new corner re-established by proportionate measurement in any one of the required directions will not suffice, since the direction of the several section lines running northward through a township or running east and west, are only in the most exceptional cases true prolongations of the alignment of the section lines initiated on the south boundary of the township; while the east and west lines running through the township, and theoretically supposed to be at right angles with the former, are seldom in that condition, and the alignment of the closing lines on the east and west boundaries of the township, in connection with the interior section lines are even less seldom in accord. Moreover, the alignment of the section line itself from corner to corner, in point of fact, also very frequently diverges from a right line although presumed to be so from the record contained in the field notes and so designated on the plats, and become either a broken or a curved line.

7. Re-establishment of quarter section corners on section lines closing upon the north and west township boundaries.—This class of corners must be re-established according to the original measurement at forty chains from the last interior section corner. If the measurements do not agree with the original survey, the excess or deficiency must be divided proportionately between the two distances, as expressed in the field notes of original

survey. The section corner started from and the corner closed upon should be connected by a right line, unless the retracement should develop the fact that the section line is either a broken or curved line, as is sometimes the case.

8. Re-establishment of interior quarter section corners.—In som eof the older surveys these corners are placed at variable distances, in which case the field notes of the original survey must be consulted, and the quarter section corner re-established at proportionate distances between the corresponding section corners, in accordance therewith. The latter surveys being more uniform and in stricter accordance with law, the missing quarter section corners must be re-established equidistant between the section corners marking the line according to the field notes of the original survey. There marks made under section 5, in relation to section lines, apply with full force here also."

Great pains have been taken by the complainants in this suit to ascertain the true location of the lake, and its relation to the several Government lots in question, and to lay before the court all the evidence attainable which would accomplish that result. The court has before it—First, the original Government plat and the field notes of the Howe survey upon which it is based. Second, the field notes and calculations of the Patton survey, so-called. Third, the testimony of three expert civil engineers and land surveyors, who not only checked the Patton survey with the aid of the field notes and calculations of that survey, but also the field notes of the original Howe survey, by running the lines

on the ground, and have found the Patton survey to be correct, and witnesses Cook and Bailey each have prepared plats showing the location of the location of the lake and the several fractional lots in question, based on the Patton survey; each of which correspond to and are copies of complainants' Ex "D" attached to the bill. And one of the defendants, Croswell himself a civil engineer and land surveyor, who with this evidence before him, and under consideration for several weeks, has not attempted to dispute its accuracy, and the accuracy of the Patton survey, and complainants' Ex. "D" based thereon is not questioned in this case either in the pleadings or in the proof.

We have deemed it important to call the Court's attention to the exact and correct location of the lake as established b ythe evidence, because of the persistent attempt on the part of the defendants on previous arguments of this case to assume quite a different location; that is, the location as delineated on defendants' Ex. "B" attached to the answer.

X.

Security, Land & Exploration Co. vs. Burnes.

In this connection we would call the Court's attention to the case of Security Land & Exploration Co. vs. Burnes, decided by the Supreme Court of Minnesota in July last and reported in Vol. 91 N. W. Repp. pp. 304. This case relates to portions

of lots 3, 5, 6, and 7 of Section 4, same township. In that case the location of Cedar Island Lake was by stipulation of the parties admitted to be correctly delineated on Exhibit "B" attached to the stipulation of facts. Fol. 39 paper book of that case. It was further stipulated that said Ex. "B" represents the lake as it actually exists and did exist in 1876 when the field notes of the Howe survey were made and filed. Fol. 26 paper book of that case.

By comparing the plat, "Exhibit B" attached to the findings in the Security Land & Exploration case, with defendants' "Exhibit B," attached to the answer, in the case at bar (pp. 73 of record) it will be seen that they are copies one of the other. That the location of the lake and the fractional lots surrounding it are the same.

While a comparison of the plats, defendants' Ex. "B" and complainants' Ex. "D," in the case at bar demonstrates the error of the former, and while no witness who has been sworn or examined in this case has claimed that said Ex. "B" correctly locates the lake, yet we beg leave to briefly call the Court's attention to portions of the record in this case which demonstrates its fault, because of the controlling influence which Exhibit "B" exercised in the decision of the Security Land & Exploration Co. vs. Burnes.

The witnesses Cook and Bailey each when questioned on the subject, swore that said Ex. "B" is imaginary, without any regard to the actual location of the lake. Fol. 438 record, Fol. 507 record.

Defendant Croswell in his testimony, in explaining the theory on which the red line system of

surveys was made, as delineated on defendants' original Exhibit "I," says that all of the excess and shortage was thrown into the north and west tier of sections but not in the north and west tier of forties. Fol. 577 record. He stated further, that the south red line on said Ex. "I" is practically parallel to the south boundary of the township and four miles distant therefrom, with the exception of the west side where it is not parallel. Fol. 567 record. In other words, it appears from his testimony that the two northern tiers of sections in this township, as delineated on the red line system of original Ex. "I," were drafted without reference to the rihgts of the property owners in the four tiers of sections lying south. That no interior lines and corners could be found within this township, except a corner post set at the northwest corner of section 36 and a quarter post in the western line of said section 36. Yet, notwithstanding the fact of the large excess in the length of the township north and south and a shortage in the distance east and west across the township, all of the excess and shortage existing in this township was distributed in the north and west tiers of sections.

Under this system of survey, it is obvious that the lake, as delineated, would lie too far north and too far east, as sworn to by several civil engineers who have been examined in this case on the part of the complainants. And by a comparison of defendants' Ex. "B" and the red line system of survey of their original Ex. "I," it is evident that on both of these plats if the side lines of lat 3 of Section 4 were extended south indefinitely, they would not reach the lake.

It was because of this fact that the Supreme Court of Minnesota held that the case of the Security Land & Exploration Co. vs. Burnes was governed by the authority of French-Glenn Live Stock Co. vs. Springer, decided at the last term of this court.

We have attached to page 97 of this brief plat "3," which delineates Ely or Cedar Island Lake and the subdivisions of the land as located by the Patton survey and as presented by complainants' Exhibit "D," attached to the bill. On this plat "3," however, as in defendants' Exhibit "B," no lines appear between the meander line and the actual waters of the lake, as the field notes of th original Government survey and the Government plat represented it as water. This plat is attached for the purpose of comparison with defendants' Exhibit "B" attached to page 73 of the record.

XI.

On the undisputed facts in the case at bar the decree of the lower courts should be sustained on the authority of French-Glenn Live Stock Company vs. Springer.

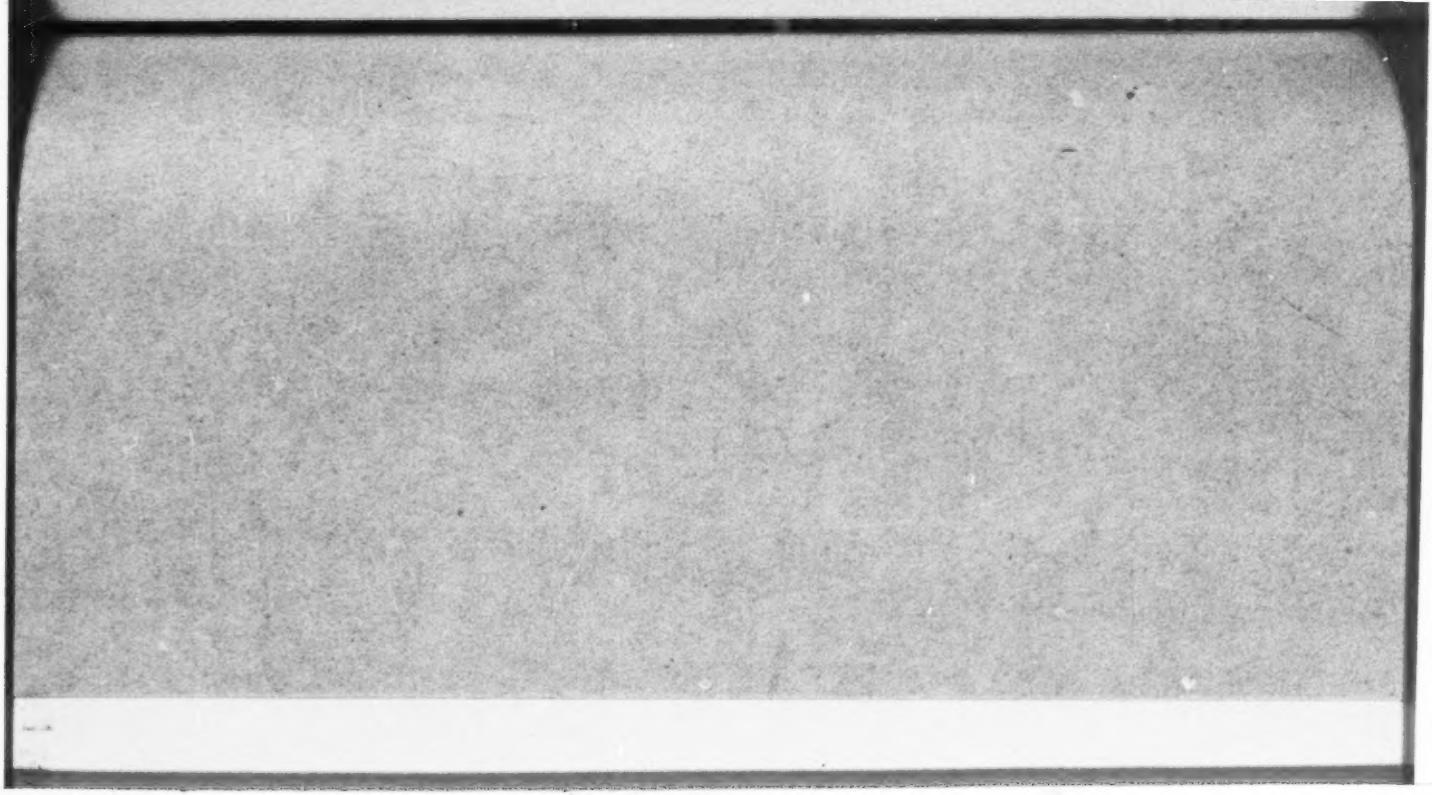
In the French-Glenn Live Ctock Co. case, it was found as a fact that no lake existed to the north of the lot in question at the time of the survey or at any time since. In that case this court held at page 566 Vol. 22, Supreme Court Reporter,—"For

the reasons already given, we think that while the plats are conclusive as to the meander line, and while, if there was a lake abutting on or to the north of the lots, the plaintiff in error should take all the land between the meander line and the water, and all accreations, it was competent for the defendant to show that there was not, at the time of the survey nor since, any such lake, and to contend that in such a state of facts, there should be no intervening land and no accreation by relic-tion."

We have, therefore, in the case at bar a state of facts undisputed, which brings us directly within the rule recognized and declared by the recent decisions of this court, and which is based on an uninterrupted line of decisions by this court, from Chief Justice Marshall to the present time.

The undisputed facts in this case are, that every lot about the lake will reach the lake and abut thereon if the lot lines are extended. See Plat "1" attached to 99 page of this brief, showing the lot line of the several lots about the lake extended from the meander line to the lake. This plat, it will be observed at a glance, is drafted on the principle governing the Patton survey and shows the location of the lake in relation to the several lots as delineated on complainants' Exhibit "D", attached to the bill, on a reduced scale.

If, therefore, the decision of the Supreme Court of the State of Minnesota in the Security Land & Exploration Co. case should receive the sanction of this court, it would not, in our judgment, constitute a precedent for the case at bar. We do not,



however, for a moment entertain the belief that this court will sustain the Supreme Court of Minneapolis in the last mentioned case on the facts presented in that record.

On the record in the Security Land & Exploration Co. case the plat shows and names the lake. The plat was made, based on the fact that the lake existed—that it was intended to be made a boundary. The intention to convey the lots covered by the patents to the lake was clearly expressed in the patents of the several fractional lots. T' s intention would not have been more clearly expressed had the patents to the respective lots named the lake as a boundary, instead of conveiying the lots according to the plat.

Referring to the French-Glenn Live Stock Co. case, upon which the defendants place such strong reliance: In that case the plaintiff did not claim that the land in dispute was included within the description of the patent, but did claim that by reason of the recission of the water, the land formed by the recission became the pltaintiff's as a reliction. The jury found that there had been no such lake, and therefore, there had been no reliction. It was not claimed that the meander line as located by the field notes differed from the actual shore line of the lake at the time of the survey. In this case there was no lake boundary at all to the north of the land in question. It was claimed by the plaintiff in this case, and this fact was submitted to the jury, that in 1877 Malheur Lake was a continuous body of water up to the meander line of that year; there was a narrow ledge or reef across the end of

the lake about 1 2or 15 miles west of the land in dispute which separated its waters from those of Harney lake; that its waters were from 8 to 12 feet higher than those of Harney lake; that in 1881 the water overflowed the ledge cutting a hole through, and as a result, the surface of Malheur Lake was lowered leaving the disputed land bare. The Jury found against the plaintiff' claim. Found that this lake whish it was claimed extended across the front of this land and to a point some twelve or fifteen miles west of the lake in dispute, never existed to the north of the land.

Reading the decision in the French-Glenn Live Stock Co. case in the light of a long and uninterrupted line of decisions by this court, we see no ground upon which Supreme Court of the State of Minnesota can be upheld.

The controversy in the case at bar is such that it presents the question nakedly, whether the United States by its patents conveyed the land which is in dispute. No question arises as to the rights of the different grantees from the United States under the patents which may conflict.

Location of the Lake by either method.—Defendants' Ex. "B.", or as it is correctly located as an undisputed fact in the case at bar, under either there can be no mistake as to the intention of the Government in granting the lands with the lake as a boundary.

In *Beaty vs. Robinson*, 130 *Ind.* 589 (30 *N. E. Rep.* 706) it was held expressly that *where there is a variance between the plat and the field notes, the plat must control, since the plat represents the lines*

fixed by the surveyor general, and the lands are sold by the plat. This is the adoption of the law as declared by this court in the large number of cases cited on 15 & 16 pages of this brief.

We will suppose, if the court please, that the record in the case at bar presented the fact of the Government conveying in one body and by one patent all of sections 2, 3, 4, 9, 10 and 11, according to the Government plat, Ex. "A" attached to the bill of complaint. In such case, would there be any doubt that the Government intended to convey and did convey all of the lots about the lake with the lake as a boundary? As a matter of fact, with the exception of lot 1, Section 11 and Lots 4, 5 and 6, Section 2, the case at bar and that of the Security Land & Exploration Co. vs. Burnes and Wickey, now pending in this court, does involve the title of all of the lands which are by said Government plat shown to be bounded by the lake, and they have agreed upon and settled the boundary as between themselves.

In the case at bar there is no question presented between the different grantees under the several Government patents or the boundaries of the several lots, and between the several owners.

Judge Lochren and the Court of Appeals of the 8th Circuit, in confirming his opinion, did not deem it necessary to decide the question of the boundary of the several lots as between the various purchasers who claimed title through the several patents from the Government.

Quoting from Judge Lochren's opinion in this case, 103 Fed. Rep., pp. 108:

"It is admitted that all the land in said township has been sold according to said plat and conveyed to the purchasers by patents referring to said plat. According to the said patents, and said plat to which they all refer, the Government has conveyed away the title to every acre of land in respect to which the land department has assumed to order this survey; the effect of which will be to disturb and cast a cloud upon the titles of the purchasers under these patents. It is admitted that as much in area in deep lakes in said town has, in accordance with said plat, been so sold and patented as land, as there is of dry land represented. this deep lake area was purchased as land by complainants.

"The Government as against purchasers, in good faith like the complainants is bound by its own plat, in accordance with which it has sold and conveyed all the land in that township. The purchasers must settle their titles and boundaries between themselves; and the land department has no longer the right to meddle with the land, or cast doubt upon the titles so conveyed.—pp. 335, Printed Record.

XI.

The fact that in order to give to each lot which by the Government plat is shown to abut on the lake, a lake frontage, it is necessary to deflect the side lines of the several lots, and, if not so deflected, the side lines will overlap each other, is immaterial.

The remarks of Justice Start in speaking for the Supreme Court for the State of Minnesota, in

opinion filed in the Security Land & Exploration Co. case in July last, that if the side lines were extended they would overlap each other in inextricable confusion is the adoption of a point in the argument of defendants' council on previous hearings o fthis case. If this objection to the plaintiffs' title to the land in controversy was held material, then the decisions of this court from its earliest history would have to be reversed.

Said Chief Justice Marshall in *McIver's Lessees vs. Walker*, 9 *Cranch* 178:

> "If water courses or other natural objects are called for in the patents, distances must be lengthened or shortened and courses varied so as to conform to those objects."

This was affirmed in Newson vs. Pryor's Lessees, 7 Wheat., 7:

Higura vs. U. S. 5 Wall, 827.

Brown vs. Huget, 21 How., 62 305.

Morrow vs. Whitney, 95 U. S., 551.

Bartlet Land & Lumber Co. vs. Saunders, 103 U. S., 316.

Ayers vs. Watson, 113 U. S., 594.

St. Clair Co. vs. Livingston, 23 Wall., 46.

Cragin vs. Powell, 128 U. S., 691.

Yarnish vs. Tarbox 49 Minn., 286.

In fact whenever this question has come before this court, the opinion of Chief Justice Marshall in McIver's Lessees has been affirmed and recognized as elementary law.

In the language of Justice Clifford in the Higura case:

> "Early surveys are loosely made and are liable to be inaccurate, especially when made in rough or uneven lands or forests; that the courses and distances given in instruments or records are more or less uncertain, and always give way in question of doubt or discrepency to known monuments and boundaries referred to as identifying the land."

In the cases cited, this court has often in plain language recognized the fact that public surveys by the government, especially in a rough or uneven country or of lands covered with forests are notoriously incorrect; and have always held in case of discrepancy or doubt that courses and distances given in instruments are more or less uncertain, and must always give way in question of doubt or discrepency to known monuments and boundaries referred to as identifying the land.

The Secretary of the Interior, as head of the Land Department of the United States, in a circular letter of instruction referred to on page 90 of our brief, in subdivision of 6 of the circular under the head "To Restore Lost or Obliterated Corners" calls particular attention to this fact and uses the following language:

> "The mere measurement in any one of the required directions will not suffice since the direction of the several section lines running northward through a township or running east and west are only in the most ex-

ceptional cases true prolongations of the alignment of the section lines initiated on the south boundary of the township; while the east and west lines running through the township and theoretically supposed to be at right angles to the former are seldom in that direction, and the alignment of the closing lines on the east and west boundaries of the township, in connection with the interior section lines even less seldom in accord. Moreover the alignment of the section line itself from corner to corner in point of fact also very frequently diverges from a right line, although presumed to be so from the record contianed in the field notes and so designated on the plats, and become either a broken or a curved line."

These instructions were sent out by the Secretary of the Interior in 1883 for the avowed purpose of replying to the numerous inquiries from county and local surveyors as to the proper method of restoring to their original position lost or obliterated corners marking the survey of the public lands of the United States. And this letter, to which reference has been heretofore made, commences on page 669 of th book issued b ythe Government entitled "The Public Domain" and published in 1884. The portion to which reference is here particularly called is found on page 92 and also on page 93 of this brief.

In the case at bar the rules invoked by the complainants for a division of the surplus land about the lake have been recognized by this court from its earliest history; and a surveyor keeping in mind that in questions of doubt or disprecency courses

and distances must give way to known monuments, in making his survey under the rules recognized by this court and the instructions of the Interior Department referred to, has only to divide the land in such manner between the proprietors of the various lots, so that each shall have his proportionate share of the surplus land and an equitable share of the water front.

In the case at bar, the meander line as shown by the Government plat is available for this purpose and this purpose only.

In making the division of the land in question no features are presented which do not frequently arise in determining division lines between separate holdings of land bordering on the great lakes and bays and the interior lakes and streams of the country. The same question is presented in determining division lines between separate holdings in shallow waters or navigable bays of other public waters where the shore is curved or irregular. In all such cases the shallow water bordering on the curved or irregular bank becomes available as land on the establishment of the dock line, and on filling in the shallow water to such dock line or any other means by which addition is made to the several parcels bordering on the water. Neither does it differ from the conditions which frequently arises in the division of land formed by accretion or reliction. In any case where surplus land is to be divided, while different rules have been adopted by different courts, yet the courts have all recognized the fact that the surplus land should be so divided as to give to each proprietor access to the water, and an

Plot 2 attached to page to 106 of this brief represents this several fractional lots with side lines deflected from the meander line as shown on the government plot to the shore of the lake so as to give to each lot its equitable share of lake frontage and of the excess land.

equitable share of the water front, and to accomplish it the side lines of lots in most cases must be deflected. The court's attention is called to the following cases in which these questions have been presented and disposd of on this principle, and they constituting but a small portion of the adjudged cases on this question:

Batchelder vs. Kemolein, 51 N. H. 496.

Kerr vs. Schneider, 114 Ill., 313-316.

Blodgett & Davis Lumber Co. vs. Peters, 49 N. W. Rep. (Wis.) 917.

Jones vs. Johnson, 18 How. 150, (15 L. 320-324).

St. Clair vs. Livingston, 90 U. S., (23 Wall) 44.

Soulet vs. Sheperd, 4 Wall., 502.

New Orleans vs. U. S., 10 Peters, 662.

Moreland vs. Page, 1 Clarke (Iowa), 139-153.

Schools vs. Risley, 10 Wall., 177 (19 L. 856.)

Johnson vs. Jones, 1 Black, 209 (17 L. 117.)

Jones vs. Soulard, 24 How., 8(16 L. 604.)

The Patton survey, by which the location of the interior corners and lines of the two northern tiers of sections was made also rests on the authority of the foregoing cases in giving each lot owner his proportionate share of lake frontage and by following its method every other interior corner, and the

boundary of every subdivision in the township can be readily ascertained and determined by any competent land surveyor.

In the Patton survey the official plat of the township is regarded as an entirety. Under it all of the purchases of land in the township are regarded as having been made in relation to the Government plat; and each land owner is given his share of any excess and bears his proportion of any deficiency and following the same equitable principals those who have purchased land represented on the plat as bordering on the waters of Ely Lake are given their proportionate share of frontage on the lake; and every purchaser of land in any other part of the township is bound to regard their right to the lake frontage, as they and all others are bound to regard the rights of every other property holder in the township as represented on such plat.

No injustice arises, or can arise, in a subdivision of the township on the principles adopted in the Patton survey. It regards the rights of every land owner therein; it regards the rights of the Government of the United States, which has sold and conveyed all of the land in this township according to the plat. As to the settlers about this lake whether they are in fact, themselves, the party in interest in the claim they make to homestead rights, or as it may be properly assumed, by the abundant means which has been at their disposal to maintain the litigation over this title, which has now been pending in the departments and in the courts for a term of years, that they are but the figure heads of capitalists; they represent the truth of the re-

mark of Justice Bradley in Mitchell vs. Smale, Supra., in speaikng of the hardships, and one not to be endured, for the government officers to make new surveys and grants of the beds of such lakes, and selling and granting the lands bordering thereon, or represented so to be:

> "It is nothing more nor less than taking Plenty of speculators will always be found as such property increases in value, to enter often the most valuable, part of his grant. from the first grantee a most valuable, and in and deprive the property owner of its enjoyment."

And also the Late Justice Mitchell of the Supreme Court of Minnesota in Lamprey vs. State, 52 Minn. 197, referring to the rule which the appellants contend for in this case:

> "If the rule contended for by the appellants is to prevail, it would simply open the door for prowling speculators to step in and acquire title from the state to any reliction produced in the course of time by the recession of the water, and thus deprive the owner of the original shore estate of all riparian rights, including that of access to the waters."

That Judge Lochren so regarded the position of the settlers in this case is evident from his adoption of the language of Judge Mitchell in the case last aobve cited, in deciding the case at bar when before him.—pp. 336 Printed Record.

This view has been repeatedly expressed in the

opinions of this court. Justice Lamar in the case of *Cragin vs. Powell*, 128 *U. S.*, 691, which is on all fours with the case at bar, referring to the purchaser under the re-survey, remarked as follows:

> When he purchased this land from Wolfe, he knew that the tract to which he was laying claim had been possessed and cultivated by the appellant for a long period of years, an advantage thus obtained a court of equity will not readily enforce."

As was said in *Taylor vs. Brown*, 9 *U. S.*, 5 *Cranch* 234 (3 L. 88):

> "The term of the subsequent location proved that the locater considered himself as comprehending Taylor's previous entry in his location. He either did not mean to acquire the land under Taylor's entry, or he is to be considered as a man watching for the accidental mistake of others and preparing to take advantage of them. What is gained at law by a person of this description equity will not take from him, but it does not follow that equity will aid his views."

The opinion expressed by Chief Justice Marshall in this last case, quoted by Justice Lamar, has, so far as we have been able to ascertain, been followed by this court on every occasion when a similar state of facts has been before it.

This case of Taylor vs. Brown was a bill in equity by the complainant. The land warrant under which the defendant claimed called for 2,000 acres of vacant land. The warrant was the basis of

the defendant's claim of title. Within the lines of the survey made under this warrant, and which survey called for 2,000 acres, there was in fact something over 3,080 acres, an excess of more than one-half. It was the title to this excess which was the subject of the controversy and the court held the whole 3,080, included in the survey, passed by the grant.

We rave referred to the light in which persons claiming title to land under similar state of facts to that of the settlers about Ely Lake have been regarded from the earliest history of this country by this court, because these settlers are the only persons who would, or can, be affected by the shape or quantity of the land included within the boundary lines of the fractional lots. So far as the lines between different holdings under Government patents are concerned, as to the most of the lots in question, these lines have already been agreed upon and settled between the parties themslves. While we believe that there can be no question as to the rights of every owner of land about Ely Lake, who derived his title through patent, and in which patent his land was described as according to the survey and plat of the township, to have his proportionate share of the lake frontage and a like proportionate share of the surplus land, yet, if this were not the established rule, *there would be no difficulty in settling the boundaries of the several fractional lots about the lake, under the rule of priority of grant.* Winano & St. Peter R. R. Co. 45 113 U. S. 618, 629; Barney Hooten vs Comerford. 152 Mass., 591. It will be noted by referring to the

copies of the several patents to the several fractional lots about the lake that they were issued on the following dates:

Lot 1, Section 3; Lot 8, Section 4; Lot 4, Section 9; February 20, 1882.—pp. 527 Record. Lot 2. Section 3; Lot 1, Section 4, sade date.—pp. 262 of Record. Lots 1 and 2, Section 10, March 3, 1883.—pp. 264-265 of Record. Lots No. 1, 2 and 3, Section 2, January, 30, 1884.—pp. 287-283 of Record. Lots 5, 6 and 7, Section 4, October 3, 1888.—pp. 296 of Record. Lot 3, Section 4, October 3, 1888.—pp. 298 of Record. From plat 1 attached to page— of this brief, it will be noted that if the side lines of the several lots are extended to the actual waters of Cedar Island Lake, that lots 1 and 2 of Section 3 and lots 1 and 8 of Section 4, will, by reason of priority in grant, extend to and border on the lake; while lots 3, 5, 6 and 7 of Section 4 and lot 1 of Section 9 will extend beyond the meander line only to the westerly line of said Lot 8. As to Lot 2, 3 and 4 of Section 9 there would be no conflict, and they would extend to the actual waters of the lake. As to Lots 1 and 2 of Section 10, they would extend to the actual waters of the lake; Lot 3 of the same section being of a later grant, but not conflicting, would extend from its northern boundary on the meander line to the lake. As to Lots 4, Section 10 and 3 Section 11, there would be no conflict; neither would there be with Lots 1, 2 and 3 of Section 2. As we have before stated, there is no doubt as to the correctness of the rule by which each lot owner is entitled to his proportionate share of the

lake frontage, yet without the existence of this equitable and just rule there would be no difficulty in establishing the boundary of the lots giving to each lot holder all of the land between the extended lines of his lot, providing there was no other prior claim.

OVERLAPPING LINES.

It is evident that one of the reasons stated in the opinion of the Supreme Court of Minnesota, in the Security Land & Exploration case, why the meander line should be accepted as a boundary line instead of the water boundary, as shown on the plat, "of the side lines of the several lots were extended they would overlap each other in inextricable confusion," finds no support in the decisions of this court. The numerous cases cited in this brief where the meander line and the body which it purports to meander have not been co-incident, have presented irregularities in lot lines different among themselves in almost every individual case. But this court has not, to my knowledge, in any case held that the shape of the lots or variation in the courses of the lot lines from that expressed in the patent, was a reason why the clear intention expressed in the instrument, to give to the respective lot owners a frontage on the water to which the patent referred, should be ignored.

If the complainants had a right to rely on the Government plat as indicating the boundary of their several lots, they and every other land owner

in the township had the right to rely upon this plat at a whole; and on no other principal can the title to any part of the land in this township be sustained. It will be remembered, that the same want of corners and lines exist in the remaining portion of the township as in the two northern tiers of sections covered by the order of survey. And this objection as to the overlapping of lot lines we believe is fully covered by the cases cited on page —— of this brief; and the principle of which are fully discussed in Moreland vs. Page.

XII.

Defendants' erroneous assumption that the meander line is the boundary.

The contention of the defendants in this case has been to the effect that the Government was not bound by its patent; that the respective patents of the fractional lots should not have effect according to their terms, or in any case convey the land to the boundary designated in the patent, because there may have been errors or fraud in the Government survey, made years before the patents were issued, and because of the excess of land btween the meandr line and the waters of Cedar Island Lake. In order to support this contention, they assume as the basis of their argument—first, that the meander line, from the fact that it is conceded that there is no evidence on the ground that it was ever run, must be taken as the line of boundary, and that such

meander line cannot be disputed. We would note here, that it is a well known fact that the meander line is seldom or never run on the ground in Government surveys. Second, because of the excess of land between the meander line and the actual waters of the lake. They assume this position against an uninterrupted line of decisions of this court, which has always held whenever the question has come before it, so far is we have been able to ascertain, that a meander line is never a boundary line when the body meandered is plain and open to be seen. Every case cited in subdivision II of this brief sustains our position, that a meander line was never intended for a boundary, but for an entirely different purpose.

As to the right of defendants to question this survey and to eliminate the waters of the lake as a boundary line from the patents under which complainants derived title, this branch of the case is fully covered by subdivision IV of this brief.

XIII.

Gross excess of land between the meander line and Cedar Island Lake.

It has been the contention of the defendants that the theory deducible from the decisions of this court on this question is, that where there was gross excess of land between the meander line and the body of water meandered, that this is an evidence of

a mistake in the survey; and in such cases the meander line, and not the body meandered, is the boundary.

The Supreme Court of Minnesota in the Security Land and Exploration Company case, quoting from Olson vs. Thorndike, 76 Minn. 399, and referring to that case, says:

> "There may be cases in which the error in the Government survey is so gross, that the purchase of the fractional, or supposed fractional, subdivision of Government land will not take to the shore of the stream or lake although the plat of the subdivision calls for such shore as one of the boundaries."

We have no doubt but that cases may exist in which the error in the Government survey is so gross that the purchasers of the fractional subdivisions of Government land will not take to the shore of the stream designated on the plat. Such a case did exist in French-Glenn Live Stock Company vs. Springer, where there was no lake bordering on the land in question, or to the north of it, which the exterior lines of the lots in question, if indefinitely extended, would reach. We submit, however, and have already discussed this question fully, that such a state of facts is not presented by the case at bar. We would in this connection call the court's attention to the gross acreage as shown by the Government plat of the fractional lots bordering on Ely Lake, and the excess of land lying between the meander line and the lake. This excess is admitted

to be about 900 acres.—See Fol. 302-303 of Record.

> "Cedar Island Lake is a navigable, deep and permanent body of water, fed principally by springs, having an area of about 900 acres instead of 1800 acres as described in the field notes of Howe and shown upon the Government plat."

Taking the acreage as shown on the Government plat of the fractional lots about the lake, we find it to be as follows:

In Section 3,	Lot 1	25.40 acres
	Lot 2	49.38 acres
In Section 4,	Lot 1	56. acres
	Lot 8	27. acres
	Lot 3	50.87 acres
	Lot 5	34.75 acres
	Lot 6	30.50 acres
	Lot 7	25.25 acres
In Section 9	Lot 1	32.90 acres
	Lot 2	25.75 acres
	Lot 3	46. acres
	Lot 4	43.45 acres
In Section 10,	Lot 2	25.50 acres
	Lot 3	39.95 acres
	Lot 4	31.31 acres
In Section 11,	Lot 3	28 acres
	Lot 2	58.80 acres
	Lot 1	39 acres
In Section 2,	Lot 4	57.75 acres
	Lot 5	28.25 acres

Lot 6 .....13.25 acres
Lot 1 .....24.30 acres
Lot 2 .....10.25 acres
Lot 3 .....16.30 acres
Making a total of .....859.81 acres

It will thus be seen that the excess land is but a trifle more in acreage than the gross amount of land in the fractional lots as shown by the Government plat abutting on the lake, which excess is to be divided proportionately among such several fractional lots. The defendants in previous arguments of this case have attempted to show a large excess. In doing so, they have gone outside of the record in the case 900 acres of excess is all that can be claimed to exist within this disputed territory. An examination of the cases decided by this court is abundant proof that such an excess has never been regarded as so gross that the purchaser of the fractional, or supposed fractional, subdivisions of Government land will not take to the shore of the stream, where the plat of the subdivision calls for such shore as one of the boundaries.

In the case of *White vs. Burnley*, 20 *How.* 235, the quantity of land that the lines of survey included was equal to two leagues, whereas only one league was called for in the grant; and the reason the surveyor gives in his certificate of survey for the excess is, that he included in the survey a bay of the ocean, which was not subject to grant, a quantity equal to a league. This statement was proved to be untrue, almost entirely. The grant contained two

leagues and more of fast land; and for this reason it was insisted at the trial that it was fraudulent and void. This is on all fours with the case at bar. The survey represented that more than one-half of the land was included in the ocean.

Newson vs. Pryor's Lessee, 7 *Wheat.*, 7 (5 L. 382), was a case, as stated by Judge Marshall in his opinion, "it is apparent that a survey was not made in fact, but that after making a beginning corner, the surveyor made out and returned a plat which he supposed would comprehend the land intended to be acquired. The call for the second line of the survey was to run south 894 polls to a stake crossing the river. This distance would not reach the river and must be continued to 1222 polls." The court here, notwithstanding the gross excess of the distance, disregarded the distance call and extended the line to the monument called for in the grant.

In *Mitchell vs. Smale* the tract patented contained, according to the field notes and Government plat, 4.53 acres. This did not include a tongue of dry land beyond the meander line, as shown by the notes and official plat, which contained 25 acres. The court held that the whole 29.53 passed by the patent.

In *Harden vs. Jordan* the same body of water and a portion of the same meander line was involved.

Cragin vs. Powell, 128 *U. S.* 691 (32 *L.* 566.) This was a case in equity which involved a water

boundary, and there was an excess over the acreage named in the grant, consisting of a strip of land one-half mile wide extending the whole length of the township.

In the Minnesota cases, *Erkins vs. Nicolin*, 39 *Minn.*, 462, the plat designated the lot as only 80 feetin width which as a matter of fact was 110 feet in width.

In *Nicolin vs. Schniderhem*, 37 *Minn.*, 63, the plat gave the lots as 33 and 35 feet in width respectively, as a matter of fact the legnth of the lots was 59¼ and 51½ feet respectively.

In *Lampry vs State*, 52 *Minn.*, 192, the greater part of a lake which had dried up was divided up among the riparian lot owners.

In *Ericson vs. Wasecа*, 44 *Minn.*, 248, about one-half of one lot was beyond the meander line.

In *Schlosser vs. Crookshank and Caldwell vs. Jackson and McNary vs. Jackson*, 96 *Iowa*, 414; 65 (N. W.) 344.

In the Schlosser case there was more land outside the meander line than within as shown by the plat. In each of the cases the excess was large.

It is evident on the authority of the foregoing cases, that the quantity of land lying between the meander line and the actual waters of the lake afford no reason why the well settled rule relating to the construction of deeds and patents should be disregarded in this case, or take this case out of the general rule which gives supremacy to natural mon-

uments over courses and distances. The case of Newsom vs. Pryor's Lessee decided by Judge Marshall in 1822, and which has never been overruled is peculiarly applicable to the case at bar. It appears from the testimony, taking it as a whole, that this township in 1876, when the Government survey was made was a wilderness difficult of access and heavily timbered.

Quoting from Newsom vs. Prior's Lessee:

> "In consequence of returning plats where no actual survey had been made, and where the country had been very imperfectly explored, the description contained in the patent often varies materially from the actual appearance of the land intended to be acquired; natural objects are called for in places where they are not to be found; and the same objects are found where the surveyor did not suppose them to be. In a country of a tolerably regular surface, no considerable inconvenience will result from this circumstance. The course and distance of the patent will satisfy the person claiming under it, and seldom interfere with the rights of ithers. That in a country where we find considerable water-courses and mountains there must be more difficulty. The surveyor calls for some known object, but totally miscalculates its courses, distances or both from some given point which he has made the beginning of his survey; and there is a variance in the different calls of his survey, and of the patent founded on it. As in this case, the second line is to run south 894 poles, to a stake, crossing the river. This distance will not reach the river; and must be continued 1,222 poles to cross the river. The distance must be disregarded and this line be extended as to

cross the river, or the distance must control the call for crossing the river. These difficulties have occurred frequently, and must be expected to occur frequently where grants are made without an actual survey. Some general rule of construction must be adopted; and the rule must be observed or the conflicting claims of individuals must remain forever uncertain.

"The courts of Tennessee and all other courts by whom causes of this description have been decided, have adopted the same principle and have adhered to it. It is, that the most material and most certain calls shall control those which are less material and less certain. A call for a natural object, as a river, a known stream, a spring, or even a marked tree, shall control both course and distance. These decisions are founded on two considerations. Generally speaking, it is the particular intention of the purchaser to acquire the land lying on the stream called for, as being more valuable than other land; and in every case where a natural object is mentioned it designates the land surveyed had there been an actual survey, much more certainly than course and distance can designate it. In this case, for example, the surveyor says that he has run south 894 poles, to a stake crossing the river. Now, it is much more probable that he should err in the distance, than in the fact of crossing the river. The conclusion, therefore, had an actual survey been made, would be, that the line did cross the river.

"The general effect of this principle undoubtedly is, that the purchaser acquires more land than is expressed in his grant, and more than he has paid for. Where this has been thought an object worthy of legislative attention, provision has been made for it. Courts cannot now shake a principle so

long settled, and so generally acknowledged."

It will be observed that Chief Justice Marshall decided this case on the ground that it was much more probable that the surveyor should err in the distance, than in the fact of crossing the river notwithstanding, the error in the distance to the natural monument resulted in adding to the grant a tract of land containing something like 1700 acres.

The *Higuras vs. U. S.*, 5 *Wall.*, 825 *at* 827 (18 *L.* 471). This was a case in which there was error, not only in the distance, but also in the courses most of which were erroneous. Chief Justice Clifford, however, who spoke, for the court, declared in favor of the natural monument, holding that courses and distances given in the instrument were more or less uncertain, and must always give place in questions of doubt or discrepancy to known monuments and boundaries referred to as identifying the land.

The fundamental rule which this court has always regarded, that boundaries fixed by natural monuments shall prevail over courses and distances and statements of quantity, will not be departed from in this case, where the excess of land is much less than that in many of the cases which we have cited, and particularly, where the complainants in this case purchased the land in question relying on the Government plat, the particular consideration which induced them to make the pur-

chase being the fact that the land bordered on and was bounded by the lake.

Said Chief Justice Cartron in White vsfl Burnley, 61 U. S. 235:

> *"To hold that this grant was void, because the surveyor returned an excess in his survey, without any evidence that the grantee participated in the matter, as is the case here, would be an alarming doctrine through a widespread portion of the United States. No instance is recollected where the state has interfered by suit to reform a land patent for excess in quantity. The consideration of more or less of excess, to constitute a prima facie fraud, would give a latitude of discretion to the Judicial Department over the executive and granting power, incinsistent with the independence of the latter in this branch of administration."*

This doctrine, announced in 1857 by this court, has not been departed from in any case where the natural boundary was found, or a body of water or other natural object meandered, was present on the ground to answer the call of the surveyor.

XIV.

The Circuit Court had jurisdiction to enjoin the survey.

The appellants by their 12th assignment of error question the power and jurisdiction of the Cir-

cuit Court to restrain and enjoin a survey of the lands described in the bill as ordered by the Interior Department of the United States, said Department being an executive branch of the Government of the United States, and, as such, having sole charge of the public lands thereof.

a

If the complainants own the land in dispute, this objection falls. The rule is settled by a long line of decisions of this Court, that with the issue of the patent all jurisdiction and authority of the Land Department over the land terminates. That after the issue of the patent, the matter becomes subject to inquiry only in the Courts by judicial proceeding, instituted to vacate the patent.

Stone vs. U. S. 69 U. S., 2 Wall., 525, 536 (17 L. 765, 766.)

Moore vs. Robbins, 96 U. S., 530 (24 L. 848).

U. S. vs. Schurz, 102 U. S., 378, 396 (26 L. 167).

Becknell vs. Comstock, 113 U. S., 149, 151 (28 L. 962, 963).

Iron Silver Mining Co. vs. Campbell, 135 U. S., 286 (34 L. 155).

Davis vs. Wiehbold, 139 U. S., 507 at 530.

Williams vs. U. S. 138 U. S., 514 (34 L. 1026).

Hardin vs. Jordan, Supra.

Noble vs. Union River Logging R. R. Co., 147 U. S., 165 at 170 (37 L. 123).

Mich. Land & Lumber Co. vs. Rust, 168 U. S., 589, 593 (42 L. 592).

Justice Brewer in speaking for the Court distinctly affirmed the decision in Michigan Land & Lumber Co. vs Rust.

b

Where land included in a patent of the Land Department was not at the time public property, having been previously disposed of, the Department has no jurisdiction to transfer the land, and its attempt at conveyance by patent is inoperative and void.

It is averred in the bill and admitted in the answer that prior to the survey and the filing of the official plat of this township in the General and local Land Offices, the land in controversy was unsurveyed land, and that thereafter and before the commencement of this suit, all of the land in said township was sold and patented by the Government according to said official plat. The approval of the plat by the Commissioner of the General Land Office was an act involving the exercise of judgment and discretion on the part of the Commissioner. The law vested in him the power and duty to decide this question of fact. He having passed upon the survey and approved of the plat,

and the land having been sold and patented according to the plat, this decision was conclusive.

It is only questions of law which are reviewable in the Courts.

Catholic Bishop of Nesqually vs. Gibbon, 158, U. S., 155 at 166 (39 L. 936).

Johnson vs. Towsley, 80 U. S., 13 Wall., 72 (20 L. 485).

Warren vs. Van Brunt, 86 U. S., 19 Wall., 646 (22 L. 219).

Shepley vs. Cowan, 91 U. S., 330 (23 L. 424).

Moore vs. Robbins, 96 U. S., 530 (24 L. 848).

Marquez vs. Frisbie, 101 U. S., 473 (25 L. 800).

Vance vs. Burbank, 101 U. S., 514 (25 L. 929).

Quinby vs. Conlan, 104 U. S., 420 (26 L. 800).

St. Louis Smelt. & Ref. Co. vs. Kemp, 104 U. S., 636 (26 L. 875).

Stee vs. St. Louis Smelt. & Ref. Co., 106 U. S., 447 (27 L. 226).

Baldwin vs. Stark, 107 U. S., 463 (27 L. 526).

U. S. vs. Minor, 114 U. S., 233 (29 L. 110).

Lee vs. Johnson, 116 U. S., 48 (29 L. 570).

Wright vs. Roseberry, 121 U. S., 488 (30 L. 1039).

Cragin vs. Powell, 128 U. S., 691 (32 L. 566).

Knight vs. United States Land Ass'n, 142 U. S., 161 (35 L. 974).

U. S. vs. Cal. & Ore. Land Co., 148 U. S., 31 (37 L. 354).

Burden vs. N. P. R. Co., 154 U. S., 288-237 (38 L. 992, 1001).

c

Up to the time of the disposal of the property the power to set aside surveys and plats, correct them or order re-surveys is exclusively in the Land Commissioner, and he binds the Government as to the facts represented on such plats, so far as pertains to any person buying in good faith according to such plat; and the Courts have power to protect the private rights of a party who has purchased the same in good faith from the Government, against the interference or appropriation of corrective surveys made by the Department subsequent to such disposition or sale.

Cragin vs. Powell, 128 U. S., 691 (32 L. 566).

Mullen vs. U. S., 118 U. S., 271 (30 L. 170).

Moore vs. Robbins, 96 U. S., 530 (24 L. 848).

U. S. vs. Schurz, 102 U. S., 378 (26 L. 167).

Steel vs. Smelting Co., 106 U. S., 447.

Davis vs. Wiebold, 139 U. S., 507.

d

The defendants in making the survey ordered, propose to exercise an unlawful control over this land. They justify their action on the sole ground that they are subordinate officers of the Interior Department of the United States, and are acting under and by virtue of the authority and order of their superior officers. This alone is sufficient to justify the decree.

Caldwell vs. Robinson, 59 Fed., 653, 660.

Campbell vs. Bubb, 69 Fed., 480.

Noble vs. Union River Log. Ry. Co., 147 U. S., 165.

Pennoyer vs. McConnoughy, 140 U. S., 1 (35 L. 363).

The case at bar is on all fours with Noble vs. Union River Logging Railroad Co., 147 U. S., 165 (37 L. 123). This was a bill in equity by the Union River Logging Railroad Co. to enjoin the Secretary of the Interior and the Commissioner of the General Land Office from executing a certain order revoking the approval of the plaintiff's map for a right of way over the public lands, and also from molesting plaintiff in the enjoinment of such right of way secured to it under act of Congress. This case involved not only the power of this Court to enjoin the head of a Department, but the power of a Secretary of the Interior to annul the action of his predecessor, when such action operates to give effect

to a grant of public lands to a railroad corporation. Most of the questions raised by appellants in the case at bar were raised and disposed of in Noble vs. Union River Logging Railroad Co. On page 172 Justice Brewer says:

> "But it has been well settled that when a plain official duty requiring no exercise of discretion is to be performed, and the performance is refused, any person who will systain personal injury by such refusal may have a mandamus to compel its performance. And when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it."

On page 176 says Justice Brewer:

> "A revocation of the approval of the Secretary of the Interior, however, by his successor in office, was an attempt to deprive the plaintiff of its property without due process of law and was therefore void."

This case supports Justice Brewer's opinion in Chicago & N. W. R. Co. vs. Peter A. Day et al., Railroad Commissioner of the State of Iowa 35 Fed. Rep. 866 (1 L. A. R. 744). This came upon motion for preliminary injunction to enjoin the railroad commissioner from putting in force a certain schedule of rates prepared by him for all transportation within the limits of the state. Said Justice Brewer on the last page of the case:

"I have endeavored in this case to discuss only the three most important questions, those which seem to me vital to the controversy. Before closing, I must, however notice two objections made by the defendants: First, that the publication of this schedule is, of itself, no invasion of complainant's rights; that no immediate trespass is threatened, therefore, no injunction should issue. But equity interferes to prevent a municipality of suits, and while one act may be the foundation of many suits, Courts have a right, and it is their duty in all these instances to stay that act, if unlawful."

It was on the authority of Noble vs. Union River Logging Railroad Co. that Caldwell vs. Robinson, 69 Fed. 653, was decided. This was a suit in equity brought by Caldwell to enjoin Robinson, an Indian Agent of the United States, from forcibly ejecting him from the possesion of certain lands in the Nez Perce Reservation. On page 660, the Court in sustaining the order for the injunction used the following language:

"The defendant is the agent of the Secretary of the Interior. The power of the Court to enjoin his agent has not been discussed. Generally the officers of the Department cannot be controlled by injunction or mandamus while acting in a judicial capacity in which their judgments are to be based on a consideration of facts. But in this case the action of the Land Department involved a construction of law which is not subject to the same rule. It is held in Noble vs. Union Railroad Co., 147 U. S., 165, that such officers may be enjoined from the

performance of an unlawful act, if the complainant is lawfully in possession of the premises it would be unlawful for the defendant to forcibly eject him, and he may be restrained from so doing."

A similar case is that reported in 69 Fed. 481 La Chapelle vs. Bubb, U. S. Indian Agent, etc. This was a bill filed by La Chapelle against Capt. Jno. W. Bubb, of the U. S. Army, as agent of the Colville Indian Agency, in the State of Washington, and certain Indian defendants, for an injunction to restrain said Indian Agent fro mforcibly ousting the complainant from certain land which he claimed as a settler under the Homestead Law. The lands in question had been included by the Government in allotments made to Indiana in fulfillment of treaty stipulations. The Court, on page 48 in sustaining the injunction held as follows:

"But the defendant Bubb justifies his proposed action on the ground that he is an officer of the United States Government acting only in obedience to orders from his superior officers in the Indian Department. And for that reason I deem it entirely proper that this Court do restrain him from committing a tort while assuming to act in his official capacity. *It is a general proposition sustained by this Court as often as the question has come before it*, that the agents of the Government may be restrained by injunction from doing unlawful acts to the prejudice of private rights where the remedy at law is inadequate; and from doing posi-

tive official acts for which they have personally and individually no authority, and contrary to a plain duty requiring no exercise of discretion.

Osborn vs. Bank of the United States, 22 U. S., 9 Wheat., 738, 867, 871, (6 L. 204, 235, 263).

Louisiana Board of Liquidation vs. MaComb, 92 U. S., 531, 541 (23 L. 623, 628).

Allen vs. Baltimore & Ohio R. R. Co., 114 U. S., 311 (29 L. 200).

Pennoyer vs. McConnaughy, 140 U. S., 1 (35 L. 363).

Belknap vs. Schild, 161 U. S., 10 (40 L. 599).

The last case cited was a bill in equity in the Circuit Court of the United States for the Northern District of California, by George Schild against George E. Belknap, Jas. Foster, Christopher C. Wolcott and Jesse Diamond for an infringement of letters patent granted by the United States to the plaintiff for an improvement in caisson gate. The defendant filed a plea to the whole bill alleging that the Court ought not to take cognizance or sustain the action. That Belknap was a commodore in the U. S. Navy Yard at Mare Island, California; that the defendants Wolcott, Foster and Diamond were respectively, a Civil Engineer in the Navy and an employe of the United States at Mare Island. That the only casson gate which either of the defendants had any relation with, control over

or use of within the State of California, was one constructed, manufactured and used by the Government of the United States and for their use and benefit at the Navy Yard, etc. The Court held that such officers or agents, although acting under orders of the United States, are therefore, personally liable to be sued for their own infringement. See also:

Davis vs. Grey, 16 Wall., 83 U. S., 203 (21 L. 447).

People vs. Dwyer, 90 N. Y., 402.

Morgan vs. Binghamton, 102 N. Y., 500.

Davis vs. Cook, 91 U. S., 50 (73 Cranch. 552).

U. S. vs. Lee, 106 U. S., 244 (27 L. 174 at 190).

Scott vs. Donald, 165 U. S., 107 (41 L. 648-653).

In the case of Davis vs. Gray, the State of Texas had granted to a railroad corporation of that state sixteen alternate sections of land per mile along the line of the road which was thereafter to be located. The company surveyed the lands and located its road through them. After all these things had been done the Commissioner of the State, acting under the authority of the statute of that state, which had declared the lands forfeited to the state, was selling certain of the lands and delivering patents for them to the purchasers. At the suit of the Receiver of the road the Circuit Court enjoined

the mfrom interfering with the rights of the road and the premises, and selling and conveying its lands; and the decree was affirmed by this Court.

Said Justice Lemar in the case of Pennoyer vs. McConnoughby, 140 U. S. 1 (35 L. 363 at 366) referring to Davis vs. Gray some of the expressions of opinion that case were criticised 106 U. S. 108, 224 (27 L. 174-190) and also the subsequent case of U. S. vs. Lee and In re Avery, 123 U. S., 443 (31 L. 216 at 223): "Where the objectionable expressions were examined and held to have been mere dicta, it has not been overruled, however, but on the contrary has been cited with approval and relied on as authority in a number of subsequent cases, and the underlying principles of it are regarded as sound the principal which the Court speaking through Justice Lemar in Pennoyer case. That where a suit is brought against defendants who, claiming to act as officers of the state, and under color of an unconstitutional statute, commit acts of wrong and injury to the rights of the property of the plaintiff, acquired under a contract with the state, such suits whether brought to recover money or property in the hands of such defendants unlawfully taken by them in behalf of the state or for compensation or damages, or in a case where the remedy of law is inadequate for an injunction to prevent such wrong and injury, the suit can be maintained."

The case of Pennoyer vs. McConnoughy was a suit in equity by the appellee, a citizen of California, against the appellants, who, under the constitution of Oregon, as Governor, Secretary of State and

Treasurer of State comprised the Board of Land Commissioners of that state, to restrain and enjoin them from selling and conveying a large amount of land in that state to which the appellees asserted title. There was a demur against the bill on the ground that the suit was practically against the state, and was, therefore, prohibited by the 11th Amendment to the Constitution. The demur was overruled. This Court held that the officers of a state may be enjoined from executing a statute of the state which is in conflict with the Constitution of the United States when such execution would violate and destroy the rights and privileges of the complainants.

E.

The Act sought to be Enjoined in this suit is a Ministerial Act.

It is apparent from the most superficial examination of the facts in this case that the act of the Surveyor General is a ministerial act. The Commissioner of the General Land Office under the instructions of the Secretary of the Interior ordered the survey. The Surveyor General carries out his instructions; there is no opportunity here for defendants to exercise discretion.

In Noble vs. Union River Logging Railroad Co., Supra., said Justice Brown in delivering the opinion of the Court:

"It was held by this Court as early as 1803, in the great case of Marbury vs. Madison, 5 U. S. 1 Cranch 137, that there was a distinction between acts involving the exercise of judgment or discretion and those which are purely ministerial. That, with respect to the former, there exists, and can exist no power to control the executive discretion, however erroneous its exercise may seem to have been, but with respect to ministerial duties, an act or refusal to act is, or may become, the subject of review by the Courts. The principle of this case was applied in Kendall vs. U. S., 37 U. S. 12 Pet. 524 (9 L. 1181), and cites the following cases in suppore of the principle:

Decatur vs. Baulding, 39 U. S., 14 Pet., 497 (10 L. 559).

Kendall vs. Stokes, 44 U. S., 3 How., 87 (11 L. 506).

Brashear vs. Mason, 47 U. S., 6 How., 92 (12 L. 357).

Reeside vs. Walker, 53 U. S., 11 How., 272 (13 L. 693).

Halloway vs. Whitley, 71 U. S., 4 Wall., 522 (18 L. 335).

U. S. vs.Seamen, 58 U. S., 17 How., 225 (15 L. 288).

U. S. vs Guthrie, 58 U. S., 17 How., 284 (15 L. 102).

U. S. vs. Edmunds, 72 U. S., 5 Wall., 563 (18 L. 692).

Gaines vs. Thompson, 74 U. S., 7 Wall., 347 (19 L. 62).

Cox vs. U. S., 76 U. S., 9 Wall., 298 (19 L. 579).

U. S. vs. Schurz, 102 U. S., 378 (26 L. 167).

Butterworth vs. U. S., 112 U. S., 50 (28 L. 656).

U. S. vs. Black, 128 U. S., 40 (32 L. 354).

"In all these cases," says Justice Brewer, "the distinction between judicial and ministerial acts is commented upon and enforced." And he further adds. "We have no doubt the principle of these decisions applies to a case wherein it is contended that the act of the head of a department, under any view that could be taken of the facts that were land before him, was ultra vires, and beyond the scope of his authority. If he had no power at all to do the act complained of, he is as much subject to an injunction as he would be to a mandamus if he refused an act which the law plainly required him to do."

XV.

Defendants must show authority sufficient in law to protect them.

This suit is not brought against the defendants because they are officers and agents, but by reason of their acts as individuals. And the Court is not ousted of its jurisdiction because they assert authority as such officers and agents. To make out their defense they must show that their authority is sufficient in law to protect them.

Mitchell vs. Harmony, 13 How., 115 (14 L. 75).

Bates vs. Clarke, 95 U. S., 204 (24 L. 471).

Meigs vs. McClugs, Lessee, 9 Cranch, 11 (3 L. 639).

U. S. vs. Lee, 106 U. S., 210 (27 L. 178).

Wilcox vs. Jackson, 13 Pet., 498 (10 L. 264).

Brown vs. Hogen, 21 How.. 305 (16 L. 125).

Grisar vs. McDowell, 6 Wall., 346 (18 L. 864).

Noble vs. Union River Logging Co., Supra.

Beach on Injunctions, Sections 1373-4-9.

Belknap vs. Schild, 161 U. S., 10 (40 L. 602).

Stanley vs. Schwalby, 147 U. S., (37 L. 259 at 264).

Caughan vs. Macon & C. R. 109 U. S., 452 (27 L. 994).

Virginia Coupon Case 114 U. S., 287 (29 L. 192).

XVI.

This is a case which calls for the equitable interference of this court.

The bill and the answer show that a survey of the land in controversy will result in the unnecessaary destruction of much valuable timber. That it will cast a cloud upon the title of the complainants, and will involve the owners in a multiplicity of suits. The complainants under any one of these

general heads of equity are entitled to a perpetual injunction as prayed for in the bill. The bill was not demurred to by the defendants, but was answered; under the general prayer for relief, the complainants were entitled to such relief as the facts stated in t ehbill justify.

English vs. Foxall, 27 U. S., 2 Pet., 595 (7 L. 531).
Tayloe vs. Merchants Inc. Co., 50 U. S., 9 How., 390 (13 L. 187).
Texas vs. Hardenberg, 77 U. S., 10 Wall., 68 (19 L. 839).
Jones vs. Doren, 130 U. S., 684 (32 L. 1080).
Landis vs. Oles, 9 Minn., 90 (Gil. 79).
Gerdtzen vs. Cockrel, 52 Minn., 509.
Huyct vs. Graham, 82 Mich., 353-356.
Story Eq. Pl., 42.
Vol. 1 Garland and Rawlsoon, Fed. Prac. 266.

As to the destruction of timber, every witness examined on the subject, including the defendant Croswell, swears that it will be necessary to cut more or less timber in order to make a currect survey of this land. And all of the witnesses sworn on the subject say that the remainder of the timber would be in great danger of fire by reason of such cutting. Merrit S. Cook, 485 Record; C. E. Bailey, Fol. 510, 511, 512, Record; Defendant Crosswell admits that the timber is very thick where the lines would have to be run, and that in order to make a

survey with such a degree of care as the surroundings would require, a transit line of at least two feet wide would have to be cut. The other witnesses testify that a transit line at least six feet wide would have to be cut. Mr. Croswell admits in his testimony (Fol. 598) that the country is somewhat rolling. And I think it is self-evident, something of which the Court will take judicial notice, that through such a country a transit line only two feet wide would have little or no value in making survey.

Every witness sworn on the subject testified that if timber has to be cut in order to make a survey, the standing timber will be in great danger of fire which is lable to take in the tree tops and down timber cut in running the transit line. This is self-evident.

Erhardt vs. Boaro, 113 U. S. 537 (28 L. 1116).

XVII.

Not only casts a cloud upon the title bu would cause a multiplicity of suits.

If the complainants owned these fractional lots with boundaries extending to the actual waters of the lake, *it is obvious from the facts disclosed by the record that a re-survey would not only cast a cloud upon the title, but would cause a multiplicity of suits.* It is allaged in the bill and admitted in

the answer that the lands in controversy were entered upon prior to 1892 by certain settlers who have since occupied it claiming the territory to be unsurveyed public lands of the United States, and it was upon this petition that the survey was ordered, Fol. 27 of Record, Bill. Fol. 115 Record, Answer. The record of this proceeding before the Land Department of the United States shows that the Government asserts proprietorship in these lands in ordering the survey. It is obvious that after surveying and platting the land that such plat would be recorded by the Land Department and the land in controversy would be claimed as public lands of the United States, and that actions against the several settlers or commenced by them would necessarily result.

Equity has jurisdiction to prevent a cloud from being cast on plaintiff's title by restraining the consummation of proceedings which would result in creating a cloud.

Vol. 17 Enc. of Pl. & Prac, page 288.

Conkey vs. Dike, 17 Minn., 457 (Gil. 434) was an action to have a mortgage adjudged satisfied and for an injunction against foreclosing it.

Huntington vs. Central Pac. R. Co., 2 Saw. U. S., 403.

Sneathern vs. Sneathern, 104 Mo. 201.

Chapman vs. Brewer, 114 U. S. 158.

Lyon vs. Allen, 130 U. S. 177.

Redman vs. Parkingham, 66 Ill. 434.

Frederick vs. Ewrig, 82 Ill. 363.

Rosser vs. Fox, 65 Ill. 200.
Maurice, etc., Co. vs. Jersey City, 12 N. J., Equity 227, 545.

King vs. Townshead, 141 N. Y. 358.

Equity will always interfere to prevent clouds from being cast upon a title and will interfere to restrain a defendant from proceeding in an illegal act, which, if completed, will necessarily cast a cloud upon that title and naturally diminish its value.

De Witt vs Van Schoyk, 110 N. Y. 342.
Conrad vs. Smith, 32 Mich. 429.

In De Witt vs. Van Schoyk an injunction was granted to prevent the closing of a highway and opening another although the damages apprehended could be satisfied by a pecuniary award.

All of the cases citey in this subdivision were decided on the ground that equity would restrain an unlawful act of a public officer when such act would naturally diminish the value of the realty.

If the land belongs to the complainants the proposed survey is unlawful. The complainants do not ask an interference in the lawful exercise of the duty of an official in a co-ordinate branch of the Government. Our whole contention is that the proposed action of the officers and agents of the Government in relation to this land is unlawful and entirely outside of their official duty.

Where there is no complete and adequate reme-

dy at law equity will assume jurisdiction of a bill to quiet title or prevent a cloud.

Lyon vs. Alley, Supra.
Chapman vs. Brewer, Supra.
Phelps vs. Harris, 101 U. S. 370.

XVIII.

The proposed Survey will Furnish Foundation for Many Suits.

It is evident that the carrying out of the order of survey which was enjoined by the Circuit Court, would have been the foundation of many suits: First, such order would on its face establish boundaries to the fractional lots. Said boundaries would cut off a considerable part of complainants' land, and all of their riparian rights as owners of the land bordering on the lake. On its face it would assume ownership in the Government of a large amount of complainants land, now occupied by settlers claiming it under homestead rights. This would involve not only a suit in equity to clear the cloud, occasioned by the filing of a plat of a resurvey, on complainants' title, but also actions of ejectment against the several settlers.

We now call the Court's attention to the special instructions commencing at Fol. 165, and being defendants' exhibit "D," annexed to their answer:

Thos. H. Croswell, Deputy Surveyor,
St. Paul, Minnesota.

Sir: In addition to the printed instructions contained in Manual of Instructions to Surveyors General dated June 30, 1894, furnished you, the following special instructions are issued for your guidance in the execution of surveys under your contract No. 73 of this date.

The execution of surveys specified in your contract will require:

1. The establishment of certain section, quarter section and meander corners on the north boundary of township No. 57, N., R. 17 W.

2. The temporary establishment of the corners of sections 1, 2, 11 and 12—sections 11, 12, 13 and 14—sections 10, 11, 14 and 15—sections 9, 10, 15 and 16—sections 8, 9, 16 and 17 and sections 4, 5, 8 and 9 and the quarter section corners between sections 9, 10 and (10 and) 11.

3. The establishment of permanent meander corners and the survey and permanent marking of the meander line of Cedar Island Lake as given in the original notes of Henry S. Howe, Deputy Surveyor, approved by the Surveyor General of Minnesota, August 19, 1876, known and described as the "Old Meander Boundary," it being the boundary line between the patented land and the public land, to be surveyed as provided for under your contract.

4. The establishment of proper permanent meander corners at ordinary high water mark in the shore of Cedar Island Lake and the meandering

of said shore line on the ground at ordinary high water mark.

5 The subdivision of all lands between the "Old Meander Boundary" and the ordinary high water mark of the lake.

You are directed in the first place to give early and earnest attention to the north boundary of the township, and if conditions not clearly provided for herein are found to exist, you are instructed to fully report the facts to this office for further instructions.

The retracement of the north boundary will begin at the most easterly, fully identified, original corner west of Cedar Island Lake and proceed easterly. If the corner of Sections 3, 4, 33 and 34 is found as represented on the diagram furnished you herewith some 20 chains north of the straight line joining the township corners, or its bearing trees not agreeing with original notes, and by measurements much too near the quarter corners between sections 33 and 34, or the corner of sections 33, 34, 27 and 28 of the township on the north, *such facts will indicate if not prove that said corner has been moved from its original position and may require its obliteration and proper re-establishment in its original position.* You will fully satisfy yourself in regard to proper identification and location of the section and meander corners west and east of the lake.

(Subdivision 3, Fol. 170). While the propriety of the restoration of interior section corners by measurement on meridional section lines is not questioned, it may be observed that inasmuch as

all the notes are admitted to be fictitious they cannot be depended upon in any one direction more than another; consequently section corners may be located on an east and west line and in this case with evident advantage. Measurement from the south boundary of the township will not be required."

This is not an original survey. All of the land in township has been sold and patented by the Government according to the Government plat. And, therefore, in making a survey of the land in the township, the rights of all land owners must be regarded. If the section corners are established by measurement on the east and west line, the one-quarter of a mile excess in the length of the township north and south is by the method adopted in this order thrown entirely in the north tier of the sections. We have set out in full the statute of the state of Minnesota under and by virtue of which the Patton survey was made. For that part of this brief which explains the correct location of Ely Lake see page 78 and 82.

The following undisputed testimony shows that the survey sought to be enjoined would affect the boundary of a large amount of property:

TESTIMONY OF C. E. BAILEY, Record, Fol. 527-508.

> Q. I would like to ask you, Mr. Bailey, what property, if any, would be effected by a re-survey of the north portion of this township and how it would be effected?

A. There are ten 40s underlaid with are in sectionst 5 and 6 with a tonnage of twenty million tons of ore on which mining has been in progress for five years and the section corners as set by the Patton survey has been accepted and month by month these have been used in mining to the lines of the different 40s for several years and a great deal of complication and expensive litigation is bound to follow any change of the Patton corners.

Q. State what other property you have mentioned would be affected by a survey?

A. The boundaries of timber lands in a great many cases would be and nearly all the timber cut in the last four years since the Patton survey has been cut on the lines based on the Patton survey. The owners applied through the county to have the question of boundaries settled and it authorized the County Surveyor to proceed and the owners of larger proportions of values in the township have accepted and been using these lines for several years.

Q. Just look at that Mr. Bailey?

OFFERS IN EVIDENCE COMPLAINANTS' EXHIBIT "E."

Q. This paper is designated Exhibit "E," can you say whether—what survey, if any, was called out pursuant to the resolutions of the Board of County Commissioners, mentioned in Exhibit "E?"

A. The Patton Survey was the outcome of this by the authority of the Board of County Commissioners.

Q. He acted under authority of this?

A. Yes, sir.

Q. Since that survey these mines have been operating under that survey, and a change would create trouble?

A. Yes, sir, conflicting boundaries in quite a number of cases, representing a large tonage of ore, would be affected by any change.

Q. In making a re-survey of this township state whether it would be necessary or not to have any amount of timber cut in order to make an accurate survey?

A. Several miles of lines would have to be chopped and a good deal of timber destroyed and the down timber would leave a danger of fire, it would be very objectionable.

No attempt is made to deny the testimony of Mr. Bailey.

The Court will observe that the Patton Survey, so-called, was made pursuant to the order of the County Commissioners of St. Louis County, under the authority conferred on that body by the section of the statutes of Minnesota above referred to, pursuant to the application of a number of property owners in the township to settle the boundaries of their lands. That by this statute the points where the posts or monuments are relocated and re-established, as was done by the Patton Survey, should be taken and considered as prima facia evidence that such points are the points where the section posts or monuments were established by the United States Government.

The Court has observed that by the Patton Survey the corners to secs.4, 5, 8 and 9 and 5, 6, 7 and 8, were established first by surveying around the township, and corners were located by intersection lines after correcting the proportionate distances

each way. Fol. 438-439-440. Testimony of Merritt S. Cook; Fol. 576; testimony of Defendant Croswell. That by this survey the overplus in the northern part of the township was divided proportionately according to the old or Government survey, so as to make each section in the township equal—Fol. 441-2.

Defendants' Exhibit "1," to which we have previously referred, is before this court. It shows two theories of surveys of the two northern tiers of sections of township 57 north, range 17 west. The red lines indicate a survey of the township measuring each line north and south eighty chains from a proper corner of the southern boundary of the township, and the east and west lines are measured proportionate distances according to the original Government survey from the eastern township line. —Fol. 566-7 of Record. This is the theory upon which the Government has ordered this survey to be made, as the surveyor is expressly instructed in the order, the execution of which is sought to be enjoined, that measurements from the southern boundary of the township will not be required.—Fol. 170. In the survey ordered by the Government, all the surplus territory is thrown in the north tier of sections (Fol. 576), by which system the lake would be thrown too far north and too far east.—Fol. 443. Note also original Exhibit "1" and defendants' Exhibit "B." By the Patton survey, the lines of all the proptrty holders in the township are regarded and each is given his proportionate share of the excess, and each loses his proportionate share of the shortage. A glance at De-

fendants' Exhibit "1" showing the lines of survey as now established by the order of the Board of County Commissioners of St. Louis County and the lines of survey as they would be run under the system in question, which was ordered by the Commissioner of the General Land Office, it is apparent at once that a multiplicity of suits would result not only as between the complainants in this action and the various settlers who have located on portions of these fractional lots claiming under homestead rights, but also between the owners of property in other portions of the territory covered by the order for survey. These lands covered by valuable timber, or from which timber has been removed, the mines of iron ore now existing, and the immence tonnage which has already been mined and removed from the land, *would furnish subjects of litigation to an extent that can hardly be imagined. Years would elapse before the litigation over these disputed lines would be settled. Business enterprise of large dimentions would be hampered, and the lines in all of that portion of the township covered by this survey would be thrown into confusion.*

Under the Patton survey above referred to, the lines of this valuable mining property, and in fact all lines in that part of the township, are looked upon as settled. And all of the remaining portion of this township can, by the lines and system established under the Patton Survey, be readily run and corners established. We can hardly conceive of a case in which more litigation would be likely to follow should this order of survey be sustained.

And it rests with this Court to determine that question.

By the Patton Survey, the accuracy of which has been vouched for by the three able civil engineers and land surveyors, and which has not been questioned or attempted by the defendants, the interior lines and corners of these two northern tiers of sections covered by the order for survey has been established. Under that survey the riparian rights of every owner of a fractional lot bordering on this lake has been recogni[z]ed; and by a continuation of that survey, to use the language of the different surveyors and engineers who have been sworn in this case, "by tying on the corners established by the Patton Survey every corner of the township canbe re-established."

We would call the Court's attention in this connection to complainants' Exhibit "D" (page 16 Printed Record) *which shows the deep and permanent lakes in this township which were sold by the Government as land. It will be noticed that St. Mary's Lake occupies a considerable portion of Sections* 8, 9, 16 *and* 17; *that there is another small lake in the western part of Section* 17, *the area probably something over forty acres; in the north half of section* 20 *more than* 100 *acres are occupied by one of these lakes; still another lake occupies the greater portion of the Southwest* 1-4 *of Section* 20, *the east half of section* 30, *and a considerable portion of the Southwest* 1-4 *of Section* 30 *and nearly half of the Northeast quarter of Section* 29; *a considerable part of sections* 27 *and* 28 *and a portion of sections* 22 *and* 26 *is taken up by another*

lake; still another in the south half of Section 28 *and north half of section* 33 *and a portion of the northwest quarter of section* 32*; a large part of section* 32 *is also occupied by still another lake.* The Government has received compensation for these various bodies of water and has assumed to patent them. Under the principle of the Patton Survey, and which we contend for , the lines of the owners of the land bordering on these various bodies of water can be easily established. They present problems to surveyors and lawyers alike, which are frequently met and passed upon in all of the timber states, especially in northern Minnesota and northern Michigan. No new principles are involved; and in the State of Minnesota particularly the decisions are so clear, and so often re-affirmed that the rights of the parties are easily determined.

It is true that in Davis vs. Board of County Commissioners, 65 Minn. 310 at 313, the Court held the statute under which the Patton survey was ordered unconstitutional, for the reason that it deprived the land owners of their property without due process of law (67 N.W. 997. This was an action to recover for services under the statute in establishing section corners, and except for the unlawful mode declared for recovering compensation for survey, the statute to establish boundaries would have been upheld, said the Court, but if the lines and corners are correctly established they will stand whether the law providing for the compensation is upheld or not.

If we are correct on the proposition that the complainants are the owners of the land in contro-

versy, that the Government has no jurisdiction to order or cause a survey of the same, there can be no question but that the Circuit Court had jurisdiction of the defendants in this action. That the decree of said Court was justified by the facts found and was justified by the law; that the Court of Appeals correctly affirmed the decree of the Circuit Court; that the decree was justified by the facts established by the undisputed evidence in the case; and that the complainants were entitled to commence and maintain this action; that the Circuit Court had power to enjoin the survey.

XIX.

Complainants have no adequate remedy at law.

The defendants have contended on the previous hearings in this case that the complainants have an adequate remedy at law, and, therefore, a bill in equity will not lie. We would ask the gentlemen who represent the officers of the Government in this suit to point us to a legal remedy which will remove the cloud cast on complainants' title by the unauthorized action of the officers of the land department of the United States in ordering this survey, which order has for the time being destroyed the marketable value of the complainants' land. We would ask them to point out to us a legal remedy which will prevent the cloud being intensified by

the surveying and platting of the land of complainants', assuming to act under the authority of the Government of the United States, and the filing of such plat for record in the General Land office of the United States and in the local United States Land Office in Duluth, Minnesota, by which the Government will assume to be the owner of the land in dispute.

It is a subject of which the Courts will take judicial notice that such acts constitute clouds upon complainants' title; that it destroys its market value; that the acts of proprietorship which the officers of the Land Department of the United States have already exercised over this land necessarily prevents the complainants from exercising over it the ordinary acts of ownership, prevents them from cutting such timber on the land as should be cut in order to save it, prevents their selling the land or the timber should they desire, or their necessities require it. This Court will notice the conditions as they now exist, and have existed since the Government asserted proprietorship over this land, and the result which must, and have, necessarily followed from the cloud cast upon complainants' title.

It is a fact of common knowledge that conditions may exist about a tract of timber that become a constant menace to its safety. That by reason of conditions that frequently arise, the danger from fire renders it necessary to cut such timber in order to save it. It is not necessary here to state that such conditions already exist. It is suffifient to know that they are liable to arise at any time.

In Sharon vs. Tucker, 144 U. S. 533-534 (36 L.

535), Judge Field while conceding the existence of the general rule that possession of real estate is required as a condition of equitable relief in certain cases, held the rule not applicable in cases where there was danger of a multiplicity of suits by or against many different parties. He also refused to apply the rule in Sharon vs. Tucker, which was an action by one out of possession who had acquired title by adverse possession to have his title adjudged complete and made a title of record.

XX.

Reference to cases cited by defendants in this action.

The questions of law raised by appellants have been settled by the repeated decisions of this Court and by the Supreme Court of the State of Minnesota. We wish to call the Court's attention to some of the decisions which are cited by the defendants in this case.

In Litchfield vs. Register and Receiver, 9 Wall. 575 (19 L. 681), this Court held that the judiciary could not interfere with executive officers in the discharge of their official duties involving the exercise of judgment of discretion, but where the duties are of a character purely ministerial and involve no exercise of judgment or discretion mandamus or injunction will lie.

The Court held the same rule in Craig vs.

Lietinsdorfer, 123 U. S. 129. This was a suit in equity to obtain the cancellation of an approved plat, transferred by the United States, of a tract of land, part of the Las Animas grant, and to enjoin him from prosecuting any suit at law or in equity on such plat as evidence of title, on the ground that it was illegally and wrongfully obtained. The Court here held that the suit could not be maintained by one who does not claim any part of the land embraced in such plat, having no equity therein, but claimed an undivided interest in the residum of the grant that may remain after satisfying the claims of actual settlers. Said Justice Mathews in this case: "He does not allege or claim that any land belonging in equity to him was awarded to others. He admits that he was not an actual settler upon or holding any part of the tract."

The Court will also observe that in the case at bar the claim of the complainants is exactly that which the Court says was not claimed in the case of Claig vs. Lietensdorfer.

The case of Granger vs. Swart, 1 Woolw. 88, was simply a charge to the jury nisi prius, was according to this directory contrary to the decision of the Supreme Court of the State of Minnesota, in a long line of cases which we have cited in the brief, and a long line of cases decided by this Court, many of which we have cited in our brief.

Lammers vs. Nissen, 4 Neb. 245, is based upon no authority except that of Granger vs. Swart. While the decision in Lammers vs. Nisson in the Supreme Court of the United tSates, was affirmed by the Supreme Court of the United States, 154 U.

S. 650, it was upon the ground that the question presented to this Court was one of fact only, that the parties did not differ as to the question of law. There was no consideration of the case on its merits.

And in the case of Bissell vs. Fletcher and Harrison vs. Stipps and other cases decided in the Supreme Court of Nebraska was reviewed by the court in the late case of McBride vs. Whitaker, 90 N. W. 966, wherein the court held it to be the settled rule of Nebraska that

> "A grant of land bounded upon a non navigable river made by the general government with reference to the plat of the survey which shows a meandered line along the river bank, conveys to the grantee title to such unsurveyed island or parts of islands as lie within the limit."
>
> "The power to make and correct surveys of the public lands belongs exclusively to the political department of the general government, and a plat of a survey made and approved by that department cannot be impeached in the courts except upon a direct proceeding for that purpose."

Fulton vs. Frandolig, 63 Tex. 380. In this case there was no brief on one side and only Texas were cases cited. No reasons were assigned for the decision, the court holding that the land was not included in the survey. It was a case arising under the state law and not involving public lands of the Government of the United States.

The case cited from 83 Texas related to lands surveyed under the State law, not to Government lands. It was a large tract of land through which

Devil's river was supposed to run, and he so designated it on his plat; but the river was not platted or designated as a boundary. His lines purported to cross the river, but were not surveyed. He mistook a dry canyon for Devil's river, the latter stream being some two or three miles distant. There was no question of meandering or meander lines in the case.

The case of Bates vs. Ry. Co., 1 Black. 204: In this case there were two channels of the Chicago river. The survey and meandering was with reference to the north channel; and hence their object, the north channel, and not the meander line, was taken to be the boundary. It being a similar case to that of Horn vs. Smith.

In McCormick vs. Hughes, 78 Ill., the land in question was bounded by a meander bayou, which object was the boundary.

Turner vs. Ry. Co. 112 Mo. 545, does not support the case of Gazzam vs. Phillips, where it was held that the boundary established by the surveyor and shown on the plat with reference to which the patent is made, is to be taken as the actual boundary of the land, though it has been erroneously established and contrary to law; though such boundary was not as located and designated on the plat.

King vs. Watkins, 96 Fed. presents merely the instructions to the jury nisi prius. In that case there were complete courses and distances established as actual boundaries, intended to be such and the designated call, which was rejected, was deemed to be a "random" and mistaken one. The clear distinction between that case and the case

of Gazzam vs. Phillips and others is the fact that the meander line is not intended as a boundary at all, whereas in the other cases referred to, lines of actual boundaries alone are involved.

The case of Glenn vs. Jeffry, 75 Iowa 20, is commented upon in the same Court in Schlosser vs. Crookshank, 96 Iowa 65 N. W. 344, 345. The rule of the case cited from this basis is that the meander line is not a boundary line, but the owner of land adjoining the meander line takes title to the high water mark of the stream or body of water. In such cases the proposed owner is a riparian owner, his title extends to and embraces all lands lying between such meander line and the high water mark, lying between such stream and the body of water.

Grant vs. Hamphill, 92 Iowa 218, was the case of a lake designated as a boundary, impossible as such because of its non-existence; there being no body of water to which the meander line could be referred. This is also commented on in Schlosser vs. Crookshank.

In Whiteside vs. U. S., 93 U. S. 247 (23 L. 882) the Court held that the Government was not bound by the unauthorized acts of its officers. That is true as a general proposition; but where power has been delegated to certain officers to act, and that act involves the exercise of judgment and discretion the Government is bound, and, again, it is estopped the same as an individual.

In Moffat vs. U. S., 112 U. S. 24 (28 L. 623) the case turned on the point that a patent issued by the Government to a fictitious person passed title to no one, and was therefore void. The Court

expressly distinguishing this case from U. S. vs. Throckmorton, Vance vs. Burbank, and referring to the language used in Polk vs. Wendell, 5 Wheat. 293 (5 L. 92); it was that used with reference to collateral attacks on patents in cases where the irregularities were committed by officers in the exercise of their admitted jurisdiction, and can have no application to acts of officers in fabricating documents in the name of persons having no actual existence.

The Court also said in Moffat vs. U. S., "A strenuous effort is made by counsel to bring these cases within the doctrine declared in U. S. vs. Throckmorton, 98 U. S. 61 (25 L. 93) and Vance vs. Burbank, 101 U. S. 514 (25 L. 929) but without success. It was held in those cases that the fraud which will justify the setting aside of the judgment of a tribunal specially appointed to determine particular facts, must be such as prevented the unsuccessful party from fully presenting his case or general operation as an imposition upon the jurisdiction of the tribunal. *Mere false testimony or forged documents are not enough, of the disputed matter has been actually presented to and considered by the tribunal.*

The case of Polk vs. Wendell above referred to, was an action of ejectment by the lessor of Pope, the grantee, from the Governor of North Carolina, on the 6th of May, 1800, against the defendant who was in possession of the tract under grant from the Governor of North Carolina, bearing date the 28th of August, 1795. A verdict and judgment was en-

tered for the defendant. On page 310, 96 L., the Court held as follows:

> "As the explanation does not come upon a misdirection of the Court but generally on a rejection of evidence offered, the only remaining question arising on its legal competency. *There is certainly a palpable distinction between the case of an original grantee and the subsequent purchaser without notice.* There can be no reason why the grantee should be favored b ythe leniency of the Court; *but the latter finding the grantee in possession of the patent of the State, which on its face presents nothing to put him on his guard, has strong claims upon the favor of the Court and justice of the country.*"

On page 304, p. 95 L. Rep., the Court says:

> *"It will be perceived that as to irregularities committed by the officers of the Government prior to the grant, the Court does not express a doubt but that the Government and not the individual must bear the consequences resulting from it;* on the contrary, it declares that the existence of the grant is in itself a sufficient ground in which every man may infer that every prerequisite has been performed."

In this connection I would call the Court's attention to one of the allegations in the bill, Fol. 7 Printed Record: That prior to the approval thereof, that is, the official plat, complaint was duly made and filed in the Department of the said United States General Land Oiffce questioning the accu-

racy and good faith of the survey, and requesting that the said department of the General Land Office examine into the same and suspend approval of said plat, pending such examination; that on the 11th day of June, 1879, the Commissioner of said United States General Land Office denied this application, and thereupon said plat was approved, notwithstanding said complaint, by the proper officers of said Government of the United States. Also to Fol. 110, Defendants' answer: The defendants admit that the Commissioners of the General Land Office approved said survey and plat after complaints were brought to his notice touching the accuracy thereof, but allege that said complaints were withdrawn by the persons presenting them, before such approval.

We would again call attention to the opinion in the case of Moffat vs. U. S., which was an action in equity to cancel two patents of the United States. The Court used the following language:

> *"The presumption as to the regularity of the proceedings which precede the issue of a patent of the United States for land is founded upon the theory that every officer charged with supervising any part of them and acting under the obligations of his oath will do his duty, and is indulged as protection against collateral attacks of third parties."*

It may be admitted as stated by counsel that if upon any state of facts the patent might have been lawfully issued the Court will presume as against such collateral attacks, that the facts existed.

In the Moffat case a patent was issued to a fictitious grantee, hence as there was no grantor to take the title, and such being the case, no title could pass by the grant.

> "But the presumption has no place in a suit by the United States directly assailing the patent and seeking its cancellation for fraud in the conduct of its officers."

Again we find a further interpretation: Said Justice Field in United States vs. Iron Silver Mining Co., 128 U. S. 673 (32 L. 573: "In this connection a word should be said of a paragraph in the opinion in Moffat vs. United States, 112 U. S., 24, 30 (28, 623, 625). That was a suit to set aside a patent issued to fictitious parties, and the Court referring to the presumption which is indulged as a protection against collateral attacks upon a patent by third parties, said:

> "It may be admitted as stated by counsel, that if, upon any state of facts, the patent might have been lawfully issued, the Court will presume as against such collateral attacks, that the facts existed; but that presumption has no place in a suit by the United States directly assailing the patent and seeking its cancellation for fraud in the conduct of their officers. It was not intended by this language to hold that presumptions in favor of the regularity and lawfulness of patents issued did not apply in suits by the United States to vacate them for fraud; but that the presumption mentioned—that is, when a patent is assailed collaterally, if it could be sustained upon

any state of facts, the Court will presume that such facts existed—could not apply in suits by the United States assailing the patent for fraud in the conduct of its officers."

In Gazzam vs. Phillips, 61 U. S. 20 How. 372, it was *held that the Court had no power to get behind the description in the patent.*

The case of Horn vs. Smith, upon which so much reliance is placed by the appellants, re-affirrmed the rules laid down by this Court in Harden vs. Jordan, Mitchell vs. Smale, Railroad Company. vs. Schurmier and others; in this case it was obvious that the Surveyor ran the lot lines of the lot in question to a bayou, which he mistook by a mark in his field notes and plat as the Indian River. The bayou was there plain and open to be seen, and fitted as the meander boundary with all of the other calls of the survey. The natural water course was there to correspond with the survey and plat.

In the case at bar the meander line is shown on the official plat and by the field notes referred to in the patents as marking the actual margin or bank of Cedar Island Lake, a navigable body of water, and, therefore, has included in the lots so bounded riparian rights upon the lake. There was no other water boundary to meet the call. And in Viles vs. Cedar Point Club, here the Court expressly re-affirmed the same legal proposition as in Horn vs. Smith, the facts, however, were different. In this case the plat and field notes show that the boundary meander lines were not on the banks or margin of navigable waters but of a flag marsh.

As to the case of the French-Glenn Live Stock

Co. vs. Springer, 22 Supreme Court Reporter 566, appeal fro mthe Supreme Court of Oregon, 58 Pacific 102, it was not claimed that the meander line as located by the field notes differed from the actual shore line of the lake at the time of the survey, and the plat referred to in the patent was made. The plaintiff's claim was that the meander line and actual shore of the lake were the same at the time of the survey, and that the lake had receded from the meander line, and by means of such recession the land formed by it became the plaintiff's as a reliction. The plaintiff did not claim that the land in controversy was included within the description in the patent, but it claimed that, by reason of the recession of the lake from the parcel of land which was described and conveyed by the patent to them attached to the latter as reliction, and thus became its property. In this manner the question of fact was presented in the case whether there was a lake whose shore was at the meander line and whcih lake had afterwards receded, leaving as reliction the land in dispute. This question of fact was submitted to the jury, who found that there had not been such a lake, and therefore, there had not been such recession, and no land had been formed by a recession of the lake from the meander line.

It will thus be seen that the plaintiff's claim made its title dependent upon the fact of recession of the waters of the yakè from a designated line, instead of making the title dependent upon the fact that the land claimed was included within the boundary fixed by the patent.

Said Justice Shiras in disposing of the case:

> "For the reasons already given, we think that while the plats are conclusive as to the meander line, and while if there was a lake abutting on or to the north of the land, the plaintiff in error would take all land between the meander line and the water and all accretion, it was competent for the defendent to show that there was not at the time of the survey, nor since, any such lake, and to contend that in such a state of facts, there could be no intervening land and no accretion by reliction."

It will be remembered that the lots in controversy in French-Glenn Live Stock Co. vs. Springer were the northerly lots of the township, so that the north line of the lots was the north line of the township; and in this statement of Justice Shiras is a distinct recognition that the plaintiff would have taken all the land between the meander line and the lake, if there had been in fact a lake to the north of th lats as they appear on the Government plat. To do this the town line would have had to be crossed.

In White vs. Lunning, 93 U. S. 514 at 525, in the description there was included two monuments, a certain fence and a certain ranch, which, if adhered to, would defeat the deed by making an impossible description. After the elimination of these monuments the description was consistent and complete. It was held, that in order to complete a possible description and preserve the deed from defeat, the reference to the monuments might be rejected as surplusage.

As to the remark by Mr. Justice Bradley in

Mitchell vs. Smale to the effect, that in case of a plain and obvious mistake of the surveyor in running a meander line, the Government would have the right to recall the survey and have it corrected, and that such mistakes do not bind the Government. There is nothing inconsistent in this, for he undoubtedly wished to be understood, that a suit in equity could, under certain circumstances be brought by the Government, where the rights of third parties had not intervened.

Many of the cases cited by the defendants are based on the charge delivered to a jury by Justice Miller in Granger vs. Schwartz, 10 Fed. Rep. 961. This was a case in which, between the date of the Government survey and the date of the entry, a considerable tract of land had been added to the riparian tract by accretion. No claim was made by either party that the meandered line as originally run did not exactly coincide with the then existing watel line. The only question of law which Judge Miller was required to pass upon was, whether accretion which, between the date of survey and the date of entry, is added to Government land, border ing upon the water courses, will pass under an entry of the Government land to which they have thus become joined. This court thereafter decided, in Jeffries vs. East Omaha Co., 134 U. S. 178, that it will so pass. Judge Miller's charge was given, however, upon the assumption that a meander line is always and everywhere a boundary line. This charge was given by Judge Miller in the trial nisi prius before the decision in Schurmeier vs. Railroad Company. This charge of Judge Miller was expressly

controverted in the East Omaha Land Co. case, as we have before observed; the court holding:

> "We are, therefore, of the opinion that the patent conveyed to the patentee the title to all accretion which had been formed up to that date."

Again referring to the French-Glenn Live Stock Co. case, this court there declares that

> "If, at the time of the survey, there was a lake abutting on or at the north of the lots, the plaintiff in error would take all land between the meander line and the water and all accretions."

In the case at bar, the fact is established that the lake was plain and open to be seen; it is the natural boundary concerning which there can be no mistake. Judge Lochren, in deciding this case in the Circuit Court uses apt words to express the facts and the rights of the parties in this case. We quote from his opinion, commencing at the second paragraph on page 335 of this record:

> "In the present case the official plat shows the bank of Cedar Island Lake, a large, permanent body of still water, as one of the boundaries of each of the fractional lots here in dispute. This is a natural, unchangeable monument and boundary to which courses, distances, and quantities must all give way. The purchasers of these fractional lots from the Government, and later their vendees, the complainants, going upon the ground with a copy of the official

map before purchasing, would not find section corners, nor any interior lines in the township; for the evidence shows that nothing of the kind was marked or designated on the ground. The only monument or boundary visible was the bank of Cedar Island Lake, and with that boundary fixed and plain they would form their judgments as to the location, character and value of the land, and as to the value of the timber thereon, which they were purchasing, as well as to the riparian rights belonging to any parcel of the land.

"The proposal of the land department now is to take summary possession of this very portion of the land which the patentees and their vendees the complainants were able to locate with certainty, from the only fixed and visible boundary, and with reference to the value and desirability of which, including the riparian rights, the purchases were made, and allow the same to be now entered by providing squatters. If the United States has still any valid claim to any portion of these lands the title to which they have conveyed away by patent, they should first establish such claim in a court of justice; and if they can recover any part of any of those lots it is quite certain that it will not be the part which they examined with the view of purchasing, and in fact did purchase and pay for."

The evidence shows, as is above stated, that the riparian rights upon this lake were considered by complainants as an important element of value in making their purchases. As stated by Mr. Justice Mitchell in Lamprey vs. State, 52 Minn. 181, 197:

"The incalculable mischiefs that would follow if the riparian owner is liable to be cut off from access to the water, and another owner sandwiched in between him and it, whenever the water line had been changed by accretions and relictions, are self-evident and have frequently been animadverted on by the courts. These considerations apply to riparian ownership on lakes as well as streams. * * * The owners of lands bordering on them have often bought with reference to access to the water, which usually constitutes an important element in the value and desirability of the land. If the rule contended for by the appellants is to prevail, it would simply open the door for prowling speculators to step in and acquire title from the state to any relictions produced in the course of time by the recession of the water, and thus deprive the owner of the original shore estate of all riparian rights, including that of access to the water. The endless litigation over the location of the original water lines, and the grevious practical injustice to the owners of the original riparian estate that would follow would of themselves be a sufficient reason for refusing to adopt any such doctrine."

The Government having sold these fractional lots and conveyed the title thereto to the purchasers by patents which by reference to the plat conveyed the lands to the banks of Cedar Island Lake, the land department has no jurisdiction or authority to meddle with these lands by making the survey which that department has ordered, and which the defendants were about to make when this suit was begun.

No reason is presented why the Government in this case should not be bound by its plat, the same as would an individual under similar circumstances.

The good faith of th ecomplainants in making the purchase in reliance upon the Government plat, and the fact that the riparian rights which they expected to acquire by the purchase was one of the principal inducements to the purchase is fully established and not questioned.

This court has held as often as similar facts have been presented for its consideration, that this alone, purchasing in good faith in reliance on the plat constitutes a cimplete defense to a proceeding on the part of the Government to vacate the patent.

We again refer to the numerous cases decided by this court, and cited in this brief, where it has held that when the land department has made and approved of a survey of the Government lands, and the plat has been filed in the proper public office, and the land sold and disposed of, that courts have the power, and it is their duty to protect the private rights of the party who has purchased in good faita from the Government against the interference or appropriation of corrective re-surveys made by the department subsequent to such disposition or sale, and so far as we can learn, this has been the holding of this court without exception.

In conclusion, we respectfully pray that the decree in this case be affirmed.

M. H. STANFORD,
Solicitor and Counsel for Appellees.

BENTON HANCHETT,
Of Counsel for Appellees.

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Office Supreme Court
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Clerk.

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Supreme Court of the United States.

OCTOBER TERM, A. D., 1902.

No. 161.

P. H. KIRWAN, as United States Surveyor-General for the District of Minnesota, and
THOMAS H. CROSSWELL, *Appellants*,

vs.

SIDON J. MURPHY, GEORGE O. ROBINSON, ELISHA H. FLINN, AND TEMPLE E. DORR, *Appellees*.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

ADDITIONAL BRIEF ON BEHALF OF APPELLEES.

S. D. LUCKETT,
Of Counsel for Appellees.

1918

Supreme Court of the United States.

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No. 161.

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Additional Brief on Behalf of Appellees.

In view of the exhaustive and very able brief prepared and filed in this case by Mr. M. H. Stanford, senior counsel for appellees, it seems almost presumption for the writer to attempt to add anything to what has been so well and fully said. At the request of appellees and Mr. Stanford, however, we desire to discuss a few of the questions involved in the case at bar, especially such as are presented by the rulings of the Land Department in this and similar cases.

While this case was in the Interior Department, the writer was the attorney for Simon J. Murphy and his co-appellees, in resisting the petition for the survey involved in this case, and for this reason, chiefly, to him has been delegated the task of discussing Departmental decisions.

I.

The Injunction Granted in this Case by the Circuit Court Runs Against the Purely Ministerial Act of Making a Survey, and the Record Presents the Question of the Jurisdiction of the Secretary of the Interior to Order Such Survey.

The position of the appellees, of course, is that the lands sought to be surveyed are patented lands, and that under the rulings set forth in the principal brief herein, the Land Department of the United States has no jurisdiction over them. To this proposition, it will be answered that we are begging the very question in issue, that question being whether or not the lands were in fact patented. It will be contended by counsel for appellants that the Secretary of the Interior is clothed with certain *quasi* judicial functions, and that he must ascertain for himself whether or not he has jurisdiction over a case that is presented to him, calling for his action, in the same way as any court must do, and such cases will doubtless be cited as Catholic Bishop of Nesqually *vs.* Gibbon, 158 U. S., 155, and Michigan Land and Lumber Co. *vs.* Rust, 168 U. S., 589, in support of the jurisdiction of the Secretary. It will further be contended, probably, that inasmuch as the Secretary has determined that he had jurisdiction to order the survey, his conclusion is final, and cannot be called in question in such a proceeding as this.

We cheerfully concede, to the fullest extent, the power and the duty of the Secretary to look into the law, so far as

it applies to the case at bar, and ascertain, in the first instance, for himself, whether or not the Land Department had jurisdiction over the subject-matter involved. We deny most emphatically, however, that if he erroneously concluded that he had jurisdiction over certain lands which once were public lands, but which, under the conceded facts of the case, the law would declare to be patented lands, his conclusion that they are not patented is binding upon the courts, but, on the contrary, we insist that it is one of the most sacred duties of the courts to protect private individuals—these appellees, for instance—from injuries which would result to them in their property rights, because of an attempt, however honest and conscientious, by the Secretary, to direct acts assertive of public ownership over lands which are really their private property.

It was contended in the Circuit Court, and in the Circuit Court of Appeals, by counsel for appellants, defendants below, that inasmuch as the action of the Secretary of the Interior in ordering this survey involved the exercise by him of discretion and judgment, and required him to find facts and construe the law, his conclusions are binding upon the Courts, and his order furnishes sufficient justification for the action of the Surveyor-General and his deputy in proceeding to execute that order.

The mere fact that an executive officer must to some extent construe the law, and exercise judgment before proceeding to do a ministerial act, does not prevent parties who may be injured by his proposed action from resorting to a court of equity to have such action enjoined, if in fact it is without warrant of law. This is not a case in which the courts are asked to re-examine the facts as found by the Secretary, and determine whether or not his finding of facts was correct on the evidence. The question is, did the Secretary, on the facts found by himself, or established on

the undisputed evidence in the record now before the Court, have jurisdiction to cause the survey of the lands here in question as public lands? His conclusion on this question was necessarily a conclusion of law, and if he erroneously concluded he had jurisdiction, and directed the Surveyor-General to proceed accordingly, the latter official cannot set up the erroneous conclusion of his superior as his justification. This branch of the case is covered very fully in the principal brief for appellees, beginning on pages 124 and 136, where a very full collection of cases bearing on the question will be found. I would also cite the case of Roberts *vs.* U. S. *ex rel.* Valentine, 176 U. S., 221. That was a case of mandamus against the Treasurer of the United States, and it was contended that the act of the Treasurer there complained of was one involving the exercise of judgment to such an extent as to preclude any interference by the courts. In the opinion of this Court, delivered by Mr. Justice Peckham, it was said:

> "Unless the writ of mandamus is to become practically valueless and is to be refused even where a public officer is commanded to do a particular act by virtue of a particular statute, this writ should be granted. Every statute to some extent requires construction by the public officer whose duties may be defined therein. Such officer must read the law, and he must therefore, in a certain sense, construe it, in order to form a judgment from its language what duty he is directed by the statute to perform. But that does not necessarily and in all cases make the duty of the officer anything other than a purely ministerial one. If the law direct him to perform an act in regard to which no discretion is committed to him, and which, upon the facts existing, he is bound to perform, then that act is ministerial, although depending upon a statute which requires, in some degree, a construction of its language by the officer. Unless this be so, the

value of this writ is very greatly impaired. Every executive officer whose duty is plainly devolved upon him by statute might refuse to perform it, and when his refusal is brought before the court he might successfully plead that the performance of the duty involved the construction of the statute by him, and therefore it was not ministerial, and the court would on that account be powerless to give relief. Such a limitation of the powers of the court, we think, would be most unfortunate, as it would relieve from judicial supervision all executive officers in the performance of their duties, whenever they should plead that the duty required of them arose upon the construction of a statute, no matter how plain its language, nor how plainly they violated their duty in refusing to perform the act required."

The case of American School of Magnetic Healing *vs.* McAnnulty, decided by this Court at the present term (November 17, 1902), opinion also by Mr. Justice Peckham, is likewise directly in point on this part of the case. In that case, the question of the power of the Postmaster-General to exclude the advertising matter of the appellant from the mails was involved, the suit being one to enjoin a local postmaster in Missouri from carrying out the orders of the Postmaster-General, precisely the question, so far as jurisdiction of the courts is concerned, presented in the case at the bar. In the course of the opinion, the case of Burfenning *vs.* Railroad Co., 163 U. S., 321, is quoted from, and the opinion then proceeds as follows:

"Here it is contended that the Postmaster-General has, in a case not covered by the acts of Congress, excluded from the mails letters addressed to the complainants. His right to exclude letters, or to refuse to permit their delivery to persons addressed, must depend upon some law of Congress, and if no such law exists, then he cannot exclude or refuse to deliver them. Conceding, *arguendo*, that when a question of fact

arises, which, if found in one way, would show a violation of the statues in question in some particular, the decision of the Postmaster-General that such violation had occurred, based upon some evidence to that effect, would be conclusive and final, and not the subject of review by any court, yet to that assumption must be added the statement that, if the evidence before the Postmaster-General, in any view of the facts, failed to show a violation of any Federal law, the determination of that official that such violation existed would not be the determination of a question of fact, but a pure mistake of law on his part, becauce the facts, being conceded, whether they amounted to a violation of the statutes would be a legal question, and not a question of fact. Being a question of law simply, and the case stated in the bill being outside of the statutes, the result is that the Postmaster-General has ordered the retention of the letters directed to complainants in a case not authorized by those statutes. To authorize the interference of the Postmaster-General, the facts stated must, in some aspect, be sufficient to permit him, under the statutes, to make the order."

So, we say, in the case at bar, that the *facts* must be such in some aspect as to permit the Secretary of the Interior to cause this proposed survey to be made. Otherwise, the order was without authority of law, and therefore void.

II.

The Facts in the Case Do Not Justify the Order for Survey.

The facts preceding the application for injunction by appellees are fully stated at the beginning of Mr. Stanford's brief. Application was made in the first instance to the Surveyor-General of Minnesota, by certain private individuals, for the survey of certain alleged public land lying around Cedar Island Lake. This application was submitted by the Surveyor-General to the Commissioner of the General

Land Office, for his action. He declined to order the survey, on the strength of such rulings of this Court as are contained in Hardin *vs.* Jordan, 140 U. S., 371; Mitchell *vs.* Smale, 140 U. S., 46, and other cases. On appeal to the Department, Secretary Smith overruled the Commissioner and ordered a hearing to ascertain the facts alleged in the petition for the survey. His opinion and decision will be found in the case of G. A. Burns *et al.*, 20 L. D., 28. In that decision (p. 31) the Secretary held that the rulings of the Supreme Court referred to were not applicable, "in that there is no question of riparian ownership here, there has been no recession of the waters of the lake; hence no accretions beyond the meander line". It will be seen on reading the entire paragraph of the Secretary's opinion, from which the above quotation is made, that in the view of the writer of that opinion, the only riparian right that could be considered is the right of accretion or reliction, and as no such right is asserted by appellees, he concluded that the question of riparian ownership was not involved. In so ruling the Secretary erred very materially as to the law of riparian rights. Reliction and accretion are mere incidents of such rights. The principal and most valuable feature of a riparian right is that of access to the water, and the law gives title to accretions and relictions to the owner of a riparian right, for the express purpose of protecting him in this right of access.

The writer of this brief prepared and filed a motion for review of the Secretary's decision in the case cited, insisting that an error had been committed as to the nature of riparian rights. This motion was overruled by the Secretary, with the express statement that all questions involved could be presented and decided after the hearing had been had to ascertain the truth of the allegations of the petition. After the hearing was had, the case again came before the Secre-

tary, and the writer again presented the question of the riparian rights of these appellees. This resulted in the decision of Secretary Francis, of October 29, 1896 (Record, p. 51). Notwithstanding the fact that in the ruling on the motion for review, it was stated that the questions presented in support of said motion could be presented at the hearing, and "then fully considered in the light of all the facts", (Record, p. 54), it was held in said final decision that the question of riparian proprietorship was *res adjudicata*.

In that decision of the Secretary, on which the order for survey sought to be enjoined was based, will be found the following finding of fact (Record, p. 53).

> "The plat made in pursuance of the survey made by Deputy Howe in 1876 was accepted and approved by the Government as the official plat of this township. All of the land of this township between December, 1879, and March, 1887, has been patented. Prior to the issuance of such patents, to wit, in 1879, complaints were made to your office as to the correctness of the survey as made, and on June 11, 1879, despite such complaints, an investigation was denied and the plat approved."

That all the land in said township, including the land in question here, has been patented, is precisely what we have contended all the time and for this reason we have always said, and do now, that the Land Department has no jurisdiction over it; but it is said that the survey made by the agent of the Government, and accepted by the Government, was fraudulent, and that none of the meander corners described in the field-notes of the survey were found in place on the meander line of Cedar Island Lake two years after the date of the survey. It is contended that the meander line was simply imaginary, and that there was land that ought to have been surveyed between said line and the waters

of said lake. It is admitted, however, that the lake existed at the date of the Howe survey, in practically its present condition, and that whatever is said in reference to the character of the meander line is equally true of every section line on the interior of the township. The Government cannot say that the comparatively small area between the meander line and the water of the lake is unsurveyed, without saying at the same time, and based on the same facts, that not a single acre of the land in the township is surveyed. But to say this would be to say that the finding of the Secretary above quoted, to the effect that all the lands in the township have been patented, is untrue in law, for the reason that unsurveyed lands of the United States cannot be disposed of under the agricultural land laws.

The township is either *all* surveyed, and *all* patented, or none of it is surveyed or patented. As is fully shown in the principal brief for appellees, the patents of the United States refer to and adopt the plats of survey, and they become part of the patent as fully as though actually incorporated therein. These plats are drawn from the field-notes of the actual survey made by the Deputy Surveyor in the field, and for this reason a certified copy of the field-notes of Howe's survey of this township was properly admitted in evidence, and is found in the record, beginning on page 203.

Constituting part of the official field-notes of the survey of the township in which these lands lie will be found the "Meanders of Cedar Island Lake", beginning on page 237 of the Record. These field-notes represent the supposed water line of the lake, and represent it as lying in Sections 3, 4, 9, 10, 11, and 2, in that township. It seems to be practical'y admitted in the case that the initial and closing points of this meander line are located correctly in place on the township line between Townships 57 and 58, North. In the answer of the defendants, appellants herein (Par. 5,

P. 38, Record), reference is made to a diagram attached to said answer, marked "Exhibit B", which diagram will be found in the Record before page 73. While, as Mr. Stanford shows, this diagram is not accurate, still it shows that even according to the allegations of appellants herein, in their pleadings, a portion of said lake lies in each section mentioned in said field-notes of the meander line. The same thing is shown by "Exhibit D", printed as the second document in the Record, representing the survey made of this township by the county surveyor. It follows, therefore, that as a matter of fact, every section line which lies between any two of the fractional lots owned by appellees, if continued in the direction indicated by the field-notes, representing the survey of said section lines, would strike the actual waters of this lake, and these section lines are so represented by the official field-notes in question. Take, for instance, the line between Sections 9 and 10, the field-notes of which appear on page 225 of the Record. These field-notes are as follows:

"(Chain)

North between Sections 9 & 10.

Var. 9 degrees 35 minutes E.

15.00 Leave swamp brs. E. & W.

40.00 Set a post for ¼ Sec. Cor. from which
Cedar 10 N. 80 W. 50 lks.
Tam. 12 N. 35 E. 42 lks.

46.40 Set a post on south shore of Cedar Island Lake for corner to fractional sections 9 & 10 from which
Cedar 5 S. 50 E. 26 lks.
Birch 8 S. 42 W. 15 lks.
The point for corner to sections 3, 4, 9 & 10 falls in the Lake and cannot be set."

This line separates Lot 4 in Sec. 10 from Lot 3 in Sec. 11, on the official plat. As already stated, if protracted, it

would, as a matter fact, reach the water. The same thing can be shown with reference to the lines between Sections 2 and 11, 9 and 10, 4 and 9, 3 and 4. The case, therefore, comes clearly within the familiar rule, fully discussed in Mr. Stanford's brief, to the effect that where the calls in a boundary of lands described in a deed refer to a fixed and permanent natural object as the beginning or ending point of a line, courses and distances must give way, and the boundary be extended to the permanent object, by the most direct line.

III.

The Position Taken by the Land Department in this Case is Contrary to the Rulings Made Both Prior and Subsequent to the Order for the Survey Herein.

As has already been said, Secretary Francis was certainly in error in ruling that no question of riparian proprietorship was involved in this case, simply because he found that the parties claiming under the patents of the United States were not asserting that the lands said to lie between the meander line and the shore of the lake had been formed since the official survey, either by accretion or reliction. It is uniformly held by the land officials, where a question of surveying an island or a strip of land alleged to be public land, between a body of water and lands that have been disposed of, is presented, that the owners of adjacent lands are parties in interest, and are entitled to be heard expressly on the ground that they may be in a position to assert claims as riparian owners. Such cases have frequently arisen, it is true, in regard to the survey of beds of lakes or rivers that have been uncovered by recession of the waters, as, for instance, by the change in the channel of a river, or the drying up of the waters of a shallow lake, but the rule is based upon the correct principle that the

owner of the shore is entitled to riparian rights, which include access to the water.

We will ask the Court to examine the following reported decisions of the Department:

James H. May, 3 L. D., 200;
Reuben Richardson, 3 L. D., 201, (Note);
John W. Moore, 13 L. D., 64;
Gleason *vs.* Pent, 14 L. D., 375;
Lewis W. Pierce, 18 L. D., 328;
Watson H. Brown, 20 L. D., 315;
State of California *vs.* United States, 24 L. D., 68;
Same case on review, 25 L. D., 199;
Lake Malheur, 16 L. D., 256;
Same case, 19 L. D., 439;
French-Glenn Live Stock Co. *vs.* Marshall, 28 L. D., 444;
Pacific Live Stock Co. *vs.* Armack, 30 L. D., 521;
Harvey M. La Follette *et al.*, 26 L. D., 453;
John J. Serry *et al.*, 27 L. D., 330;
Archie G. Palmer, 27 L. D., 380;
John McLennen *et al.*, 29 L. D., 415;
Same case, 30 L. D., 527:
James Popple *et al.*, 12 L. D., 438;
John P. Hoel, 13 L. D., 588;
Instructions, 14 L. D., 119;
F. M. Pugh *et al.*, 14 L. D., 274;
L. F. Scott, 14 L. D., 433;
Pruszynski *vs.* R. R. Co., 14 L. D., 637.

It will not be necessary to discuss the above rulings in detail, and only a few of them, in groups, need be quoted from. Several of them differ in their facts from the case at bar, relating as they do to the beds of shallow lakes or ponds, from which the water has dried up or disappeared, and in a few instances to islands in streams, which had formed subsequent to the official survey of the adjacent shores. But all through the long line of Departmental decisions, it will be found that the Department has uniformly recognized the

fact that where the plat of the Government survey shows a stream, lake or other body of water, defined by meander lines, it is held that the parties to whom the Government title to the adjacent lots has been conveyed are presumably owners of riparian estates. Take for instance, the two cases of Gleason *vs.* Pent, 14 L. D., 375, and Lewis W. Pierce, 18 L. D., 328, *supra*. These cases involved the same section of land in the State of Florida bounded on the east by Biscayne Bay, a navigable arm of the Atlantic Ocean. The first survey of the township was made in 1845, in which the fractional section involved was shown as containing 164.84 acres, and was designated as Lots 1 and 2. These lots were both disposed of to Gleason by that survey. In 1875, an amendatory survey was made, by which the water line bounding the fractional section there in question was shown as being far to the east of its position on the plat of 1845, with a much greater area in the section. Diagrams of the respective surveys of this section will be found on page 329 of the case in 28 L. D. W. H. Gleason had entered the entire fractional section, embracing lots one and two, as a homestead, prior to the survey of 1875. By the latter survey, Pent applied to enter the lands shown as lying east of Gleason's homestead claim, and the case went by successive appeals to the Secretary. In the case in 14 L. D., it was assumed that the land between the old line of 1845 and the new line of 1875 was an accretion. In his decision in that case, the First Assistant Secretary said :

> "The public surveys are the official description by which the public lands are disposed of by the Government. When, therefore, the patentee made his original entry, the then official survey of 1845 was, as claimed by counsel, an 'assurance of the proprietor that a riparian estate was for sale.'
>
> "Such entry was a segregation and a disposal of the land in accordance with that survey, and rights there-

by acquired could not be impaired by the subsequent survey of 1875.

"The patent under which the appellant claims being based upon such original entry took effect as of its date, and conveyed the riparian estate described by the first survey.

"That riparian owners are entitled to such accretion as that now under consideration is too well settled for serious discussion."

I call special attention to the concession made by the Secretary, to the effect that the plat of the survey of 1845 was "an assurance by the proprietor (The United States) that a riparian estate was for sale." This is undoubtedly a correct view of the effect of filing such a plat in the United States land office, and offering the lands shown thereby for sale. So in the case at bar, when the plat of the township in Minnesota, here involved, was approved and officially filed in the local land office at Duluth, the proprietor of the lands, The United States, assured the public that a riparian estate was for sale, and with that assurance still standing, it disposed of all these lands, and the appellees herein, believing in good faith that this assurance was true, and in fact knowing that it was true, from having the shores of the actual lake examined by their agents, they purchased the lands in controversy, around said lake, very largely for the purpose of securing this identical riparian estate.

But in the later case of Lewis W. Pierce, *supra*, it was shown to the Department that, as a matter of fact, the land indicated in the second survey of 1875 was not an accretion to the lot shown by the plat of 1845, but was in fact high and dry land, on which large timber was growing at the date of that survey. Lot 1 therein contained about eighty acres by the survey of 1845. The survey of 1875 shows about 100 acres of additional land between the old meander

line and the ocean and it was shown, as stated, that this land was in existence in 1845. Here is a much larger relative excess than appears in the case at bar, notwithstanding which Secretary Smith, who afterwards ordered a hearing as preliminary to the survey in question in the present case, said :

> "In the appeal under consideration, however, it is claimed that the land in question cannot be an accretion as timber is growing thereon more than 100 years old ; that there must have been a mistake in the original survey and to ascertain the facts a hearing is desired.
>
> "To admit that there was a mistake in the survey could not, to my mind, alter the case for it is not claimed that, even if a mistake had been made, Gleason was in anywise responsible for it or that it was made through his connivance.
>
> "He made entry fifteen years after the survey of 1845, and his contract with the Government was based upon the recognized plat then on file. This assured him a water front, and undoubtedly this fact influenced his selection of the land. This being so, no subsequent survey can deprive him of his frontage on the water."

Again, the Secretary recognizes the fact that, as the owner of the land under the survey of 1845, the United States represented to Gleason that the land it was offering for sale had a water front, and that, having sold the land to him under this representation, it could not afterwards, by its agents, deprive him of that water front on the claim of a mistake in the survey by which the land was sold to him. The similarity of the cases cited to the one at bar is very striking.

Again, take the group of the last six cases above cited, beginning with the case of James Popple *et al.*, 12 L. D., 433, *supra*. The Popple decision was a departure from the previous position of the Department as to the ownership by

the United States of the beds of meandered non-navigable lakes. In that case, Crab Lake, in the State of Washington, had been largely drained, and the bottom reclaimed and brought under cultivation, at a large expenditure of money and time, by parties who asked to have the lands so uncovered surveyed and disposed of. Their petition was granted on the theory that the bed of the lake remained the property of the United States. This decision was made just twelve days before the decision of this Court in Hardin *vs.* Jordan, 140 U. S., 371, and on the strength of the latter case, was overruled in the case of John P. Hoel, 13 L. D., 588, *supra*. In his instructions of January 12, 1892 (14 L. D., 119), Secretary Noble refers to the decisions above mentioned relating to the applications for the survey of lands within meandered lakes, and rivers, and said: "The practice of denying such applications, in force before the Popple case was decided, will, in general, be continued."

When the case of F. M. Pugh *et al.* (14 L. D., 274), *supra*, came before Secretary Noble, he found that all the fractional lots surrounding the lake there in question, which was shown on the plat to be three or four miles long and from one-half to one mile in width, had been disposed of by the Land Department. It was further shown that inside of the meander lines of said alleged lake were tracts of land of considerable extent, on which hay was cut, and which were easily reclaimed for agricultural purposes by drainage. Understanding this, the Secretary refused to order the survey and said, (Op., p. 276):

> "It is manifest by the showing made by the several applicants that much of the land within the meander line of the lake is valuable for agricultural purposes; also that considerable labor and money have been expended looking to the reclaimation of the land—surveyed and reported by the Government officers as

"lake". But, inasmuch as the lots immediately contiguous to and surrounding the meander line of the lake have been either patented or applied for by the various claimants, riparian rights have intervened."

In the last case above cited, that of Martin Pruszynski, the present writer represented the petitioner, Pruszynski. It is shown by the statement of facts in the decision of the Secretary that, abutting upon the fractional lots in section 15, there involved, was a tract of 129.75 acres, of dry land, within the meander lines of what is represented on the plat as a lake. The evidence taken at the hearing ordered in that case showed without contradiction that the so-called lake never did extend into section 15, but that the entire section was solid land at the time of the survey. Section 15, however, had been granted to the R.R. Co., and the adjoining section 16 to the State of Minnesota, as school land. Upon such a case, Secretary Noble refused to order the survey, and said (Op., p. 640):

> "The present tract lies within the State of Minnesota, and there can be no doubt but that the common law doctrine as to the rights of the owners of land on non-navigable lakes and ponds prevails in said State. The proprietors of the land on the rim of this lake own that within the meandered line of the lake, according to their several interests."

The decisions and instructions relating to Lake Malheur, in Oregon, are also significant as to the position of the Department in such cases as the one at bar. That lake was represented on the plats of the Government survey as being over twenty miles long, and about five miles broad, extending entirely across three townships, and into the fourth. In 1892, certain petitions were transmitted to the Secretary of the Interior, representing that said lake was very shallow around its borders, that by cutting a ditch across a low ridge

between said lake and Lake Harney the original surface of Lake Malheur had been lowered several feet, leaving bare large quantities of land which could be surveyed and disposed of by the Government. In his ruling of March 3, 1893 (16 L. D., 256), Secretary Noble held that as to such lands as were opposite fractional tracts still retained by the Government, or opposite portions of some of the townships that were unsurveyed, they were subject to survey and disposal, but that as to such lands as were opposite tracts that had been disposed of, either by the swamp-land grant to the State, or by entry, the Department had no jurisdiction, and could not survey them. The other cases in the list of cases cited at the beginning of this subdivision, relating to Lake Malheur, are as follows: Lake Malheur, 19 L. D., 439; French-Glenn Live Stock Co. *vs.* Marshall, 28 L. D., 444; and Pacific Live Stock Co. *vs.* Armack, 30 L. D., 521. From a reading of all these various cases it will be found that the surveys of the townships bordering on said lake present various aspects of the right to survey lands inside of a meander line represented on the plat as running along the shore of a lake. Some of the lands bordering on the lake were not surveyed at all when these questions arose, and there was no meander line opposite them. The field-notes in some of the townships described the section lines as running to Lake Malheur, and purported to fix meander corners on the shore of the lake. In other townships, the meander corners and lines were described as being fixed with relation to "Malheur Lake Marsh". The original instructions, given in 1893, to survey only the lands opposite those still owned by the Government, were modified by the instructions set forth in 19 L. D., and the Suveyor-Gereral was directed to survey all the lands within the old meander line, up to the actual shores of the lake as they then existed, reserving to private owners of fractional lots along the old

survey the right to have their interests as riparian proprietors properly protected after the survey should be made. The land involved in the case of French-Glenn Live Stock Co. *vs.* Marshall is contiguous to that in the case of French-Glenn Live Stock Co. *vs.* Springer, 185 U. S., 47, which is discussed in the brief of Mr. Stanford. In the case before the Secretary, the lands which it was sought to have surveyed were treated as reliction, and it was held that by the swamp-land grant the State became a riparian owner, and was entitled to relictions and accretions. No question was raised in the pleadings in that case as to whether in fact the waters of the lake did extend opposite the fractional sections, containing the lots which had been patented to the State, but in the oral argument, one of the attorneys stated to the Secretary that in a certain case, pending in the courts, numbers of witnesses had sworn that the lake did not extend opposite the surveyed lands there involved, at the time of the survey at all, and that the lines of the fractions, if extended north and south, would go entirely across dry land, and never strike the lake ; but as this question of fact was not presented for his official action, the Secretary made no ruling in regard to it. It is, of course, governed by the case decided in this Court, *supra*. In the case of Pacific Live Stock Company *vs.* Armack, *supra*, the Secretary held that the meander line did not purport to represent the sinuosities of the shore of the lake, and quoted from the field-notes of the survey of the township there involved, to show that the surveyor closed his survey on the marsh lands lying along the border of the lake, and that he reported that by surveying these marsh lands, the township could, in his judgment, be made entire, and would not be fractional at all. On these facts, the Secretary properly applied the ruling of this Court in the case of Niles *vs.* Cedar Point Club, 175 U. S., 300.

Further discussion of the Department decisions cited in the

table of cases first set forth does not seem to be necessary, but they all illustrate some point arising in the case at bar, and show that with the exception of this one present case, and the overruled Popple case, the Secretary has recognized the same principles as are firmly fixed by the decisions of this Court. The general rule deducible from his decisions may be thus stated. Where the plat of the survey of a township of public land gives the assurance of a riparian estate, by reason of the fixing of a meander line, representing the rim of a lake or the shore of the ocean as abutting upon the fractional sections, and, in fact, there is such a body of water opposite such sections, the Land Department has no jurisdiction to attempt to amend the survey of such township, after having disposed of such fractional lots, by its own plat, for the reason that the water line is the boundary of such fractional sections; but where, in fact, no such body of water exists, within the limits of the sections or townships represented by the plat, there can be no riparian rights conveyed by the patent of the United States, and the courses and distances of the lines run about the fractional tracts must be taken as their boundaries.

When the present case came before him, the then Secretary of the Interior erred in not applying the first part of the above rule to the case, for, as already shown, it was conceded that Cedar Island Lake was an existing body of water at the time of the Howe survey, lying mostly inside of the meander lines represented by his field-notes, and purporting to be one of the boundaries of each of fractional sections 2, 3, 4, 9, 10, and 11, and that as a matter of fact, said lake does occupy portions of all of said six sections. It comes, therefore, clearly within the rule laid down in the last paragraph of the opinion of this Court, as formulated by Mr. Justice Shiras, in French-Glenn Live Stock Co. *vs.*

Springer, *supra*, as already pointed out in Mr. Stanford's brief.

Without discussing it, I ask that the very able opinion of the Assistant Attorney-General for the Interior Department, adopted by the Secretary as his decision, in the case of LaFolette *et al.*, 26 L. D., 453, be carefully read, especially portions of the opinion found on pages 464 and 466.

The last decision of importance made by the present Secretary of the Interior on a case similar to the one at bar was in the case of T. A. O. Stensland *et al.*, decided November 21, 1902, and not reported. A correct copy of that decision is attached to this brief as an appendix. The initials of the several Assistant Attorneys, and of the Assistant Attorney-General for the Department are attached to the decision as they appear on the original, showing the care with which said case was considered before the decision was rendered. It cannot be doubted that the opinion was prepared with some caution, in view of the fact that this present case was pending before this Court for argument, and no discussion of the general principles of law governing the right or power of the Secretary to make such a survey is found in the opinion. The facts found in the decision, and the conclusion reached, however, are very significant, and are in harmony with the decisions of the Circuit Court and the Circuit Court of Appeals in the case at bar. In the Stensland case, the question was presented of the power of the Department to survey an alleged strip of unsurveyed land lying between the meander line on the Government plat, representing the line of Baker's Bay in Washington, and the true water line of said Bay, opposite that township. This strip was shown to be about 900 rods long, and of an average width of 70 rods, making an area of 393.75 acres. It was shown that over 700 people were living on this strip, and it was alleged

that said land had been omitted from the official survey, and therefore was not either accretion or reliction. The Secretary further found that as to the fractional lots abutting on this meander line, those in three of the sections were included in two donation claims which had been patented, and that the State of Washington was laying claim to the lands outside of the meander line, as tide lands. It may be remarked that if the question whether or not a lake exists opposite fractional lots is a question of fact which may be inquired into, even after patent issues, it is likewise a question of fact as to whether a certain strip of land was subject to be covered by water at high tide, and may be inquired into by the Secretary, in a proper case, as well as by the courts. The Secretary, however, in the case cited, refused to order the survey, and said:

> "Although the physical condition of the alleged strip of land between the meander line and the actual water line of the bay might indicate that the meander line did not strictly and accurately follow the sinuosities of the bay, the most that can be said is that it was a careless and incorrect survey, but was not sufficient evidence to show that there was any collusion between the surveyor and others, to defraud the Government, and even if the authority now rests with the Government, to investigate and correct said survey, it does not appear that any good purpose can be subserved by interfering with it at this late day, and thereby disturbing rights and titles that have grown up under it during the long period which it stood unchallenged."

So, we say, in the case at bar, that after the Commissioner of the General Land Office had refused to investigate charges of irregularity, if not fraud, in the survey of the township here involved, with special reference to the northeast part of the township, in 1879, and had in the next seven or eight

years, disposed of all the lands in the township, and issued the patents of the United States therefor, according to the plat which he had accepted and approved, and after the patentees had sold the lands to other parties, in good faith, for valuable considerations, the present appellees among the number having relied expressly on the assurance made by the Government plat, that they were acquiring a riparian estate, it does not appear that the Department should now interfere to disturb rights and titles that have grown up under the representations of the Government. As shown in the brief of Mr. Stanford, the settlers and purchasers of lands in this township, finding no Government corners by which they could properly identify the lands patented to them, proceeded according to the statutory method provided by the laws of Minnesota, to have the county surveyor locate their lines and corners officially. This was done, as is shown by the evidence, and all the owners of the lands, including these appellees, accepted the survey of the county surveyor as establishing their lines for them, carrying the same up to the waters of Cedar Island Lake, and excluding five other lakes in the township from private ownership, after they had been sold by the Government as land.

The instructions issued by the Commissioner of the General Land Office, under the direction of the Secretary, for the guidance of the surveyor, who should take the contract to make the proposed survey, are set out in the record, beginning on page 55, as an exhibit to the answer of the defendants, appellants herein. On page 56, paragraph 2, the contractor, Mr. Crosswell, is instructed that the execution of the survey specified in his contract would require the temporary establishment of the corners common to sections 1, 2, 11, 12—sections 11, 12, 13 and 14—sections 10, 11, 14 and 15—sections 9, 10, 15 and 16—sections 8, 9, 16 and 17 and sections 4, 5, 8 and 9. In the last paragraph, page 57, Record,

he is further directed to find or re-establish on the eastern boundary of the township, the corner of sections 7, 12, 13 and 18, and "then run out the lines between sections 12 and 13, 11 and 14, 10 and 15, etc., according to the bearings and distances given in the original field-notes, and determine the most probable positions for the section corners" referred to in paragraph 2, *supra*. And yet it is conceded that all the lands on which Mr. Crosswell is directed to establish these lines and corners are patented lands in the possession of private owners. The Secretary of the Interior, therefore, has no more authority to direct his Surveyor-General, by his deputies, to go upon these private lands in Minnesota, for the purpose indicated, than he would have to send a subordinate officer out into Maryland or Virginia, to run lines and fix corners on private lands, with the view of establishing some supposed claim of the Government to other lands. It is conceded on all hands that the corners referred to in the above orders are not in place, and were never, in fact, properly set by Howe, when he made the survey, in 1876. The owners of the lands in the township have had corners fixed by the county surveyor. Under the instructions above set forth, as given to Mr. Crosswell, he cannot fix the corners and lines in accordance with the county surveyor's survey, and the result would inevitably be to raise disputes, and possibly litigation, among the owners of the lands on which Mr. Crosswell would fix his corners and lines. And yet, it is clearly impossible for him to locate the old meander line, without following some such course as is outlined for his guidance in said instructions. Certainly, the Secretary has no jurisdiction to order the re-survey of the section lines described in these instructions, after the lands have been patented and passed into the possession of private owners. These very instructions are an implied admission to the effect that the contemplated

survey cannot be made without going upon the lands over which the Land Department has no jurisdiction.

All the other questions in the case seem to be so fully covered by Mr. Standford's brief, that I will not pursue the discussion further.

Respectfully submitted,

S. D. LUCKETT.
Of Counsel for Appellees.

APPENDIX.

30-143. E. F. B. S. V. P.
W. V. D. W. C. P.

DEPARTMENT OF THE INTERIOR.

WASHINGTON.

November 21, 1902.

THE COMMISSIONER OF THE GENERAL LAND OFFICE:

SIR: With the letter of your office of November 7, 1902, is transmitted the appeal of T. A. O. Stensland and others, from the decision of your office of May 14, 1902, rejecting their application for the survey of an alleged tract of unsurveyed land, lying outside of the meander line of Baker's Bay, in fractional sections 6, 7, 8, and 17, in T. 9, N., R. 10 W., Willamette Meridian, Washington.

The petitioners allege that the Government's survey of said township was made in 1858, and that by said survey, the meander line of Baker's Bay, along said fractional sections, was so run as to exclude a valuable strip of land, about 900 rods long, and of an average width of about 70 rods, which strip lies between the Government meander line so surveyed, and Baker's Bay; that said strip is now, and has been for fourteen years last past, settled upon, and is now occupied by more than 700 persons, who have placed valuable improvements thereon, believing that upon a proper survey, the tract would be shown to be public land; that on October 29, 1897, the State of Washington, claiming said land as tide land, executed a deed of conveyance of the same to one Matilda J. Gile, who pretends to hold title to the same, except as to some small portions that have been sold to some of the petitioners herein, who have paid a consideration therefor, and have accepted her deeds to avoid litigation.

The petitioners do not claim any right in themselves to

said land, but contend that "either a grave mistake was made by the surveyor who in 1858 ran the pretended meander line referred to in the petition, or else the same was tainted largely with fraud upon the Government".

You state that the donation claims of George Dawson and William McGunigal, embracing 312.06 and 314 acres, respectively, and situate in said sections 6, 7 and 8, were surveyed in 1863, and that the western boundaries of said claims were co-incident with, and closed on the meanders of Baker's Bay, as made by the survey of 1858. It thus appears that the public lands bounded by the meander line as delineated by said survey, were disposed of forty years ago, and that the State of Washington has asserted title to the lands excluded by the survey, as tide lands, and has parted with her claim, to third parties.

The evidence submitted in support of the petition is the statement contained in the affidavits of several persons, that spruce and alder trees are standing and growing upon the said lands, ranging in size from one foot to three feet in diameter, and that trees recently cut therefrom show by their grain, an age of eighty years. In this connection, the petitioners, in their appeal, call attention to the fact that H. S. Gile, who surveyed the meander line in 1858, is the husband of Matilda J. Gile, who, after said survey, acquired the title to the donation claims above referred to, and now holds the title to same in her own name—which they insist is sufficient alone to establish grave suspicion of fraud and collusion on the part of Gile and his wife, and to warrant a full examination into the matter.

Admitting all the facts alleged by petitioners to be true, the conclusion is not warranted that the alleged erroneous meander was prompted by any fraudulent purpose or intent on the part of the surveyor, nor are said facts sufficient to warrant an investigation by the Government, into the

matter. Although the physical condition of the alleged strip of land between the meander line and the actual water line of the bay might indicate that the meander line did not strictly and accurately follow the sinuosities of the bay, the most that can be said is that it was a careless and incorrect survey, but was not sufficient evidence to show that there was any collusion between the surveyor and others, to defraud the Government, and even if the authority now rests with the Government, to investigate and correct said survey, it does not appear that any good purpose can be subserved by interfering with it at this late day, and thereby disturbing rights and titles that have grown up under it during the long period which it stood unchallenged.

The decision of your office is affirmed, and the papers are returned herewith.

Very respectfully,

(Signed) E. A. HITCHCOCK,
Secretary of the Interior.